# United States Court of Appeals for the Second Circuit



## **MEMORANDUM**

# 75-6092

UNITED STATES COURT OF APPLA S

FOR THE SECOND CIRCUIT

Docket No. 74-C-1313

WILLIAM L. EVERS, Executor of the Estate of WILLIAM DANA MILLER.

V.

Plaintiff-Appellant,

CASPAR WEINBERGER, Secretary of Health, Education and Welfare.

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

OPINION OF THE DISTRICT COURT AND PORTIONS OF THE ADMINISTRATIVE RECORD (VOL. 1)

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TES COURT OF

OCT 22 1975

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

WILLIAM L. EVERS, Executor of the Estate of WILLIAM DANA MILLER, F I L E D
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

AUG 7 1975

No. 74-G-1313

Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,

Defendant.

Memorandum of Decision and Order

August 7, 1975

MISHLER, C.J.

This is an action brought pursuant to §205 of the Social Security Act, as amended, 42 U.S.C. §405(g), to review a final decision of the Secretary of Health, Education and Welfare, denying old age insurance benefits to the decedent, and directing that overpayments made for the months January, 1966 through December, 1971 not be waived.

- - -x

On March 31, 1966, William D. Miller filed an application only for Medicare benefits, stating that he was employed as a consultant. On June 1, 1966, he filed an appli-

<sup>/1</sup> William D. Miller died during the pendency of this action and the executor of his estate was substituted in his place as party plaintiff.

cation for old age benefits. He stated in his application that for the period January 1, 1966 to the date of filing the application his earnings totaled \$2,600 and that he expected to earn a total of \$4,125 for the year 1966.

William D. Miller was born on January 6, 1906. He graduated from the University of Chicago in 1919 with a degree of Bachelor or Science in geology. He worked for the Gulf Oil Corporation in the United States and in Columbia, South America as an exploratory petroleum geologist. In 1920 he contracted malaria and was hospitalized in 1921 and 1922 for treatment of the disease. The regimen included taking large quantities of quinine, which he continued to take over the years. The medication ultimately affected his hearing. By the year 1968, it is estimated that Mr. Miller had an 80% loss of hearing in the right ear and 100% loss of hearing in the left ear, with an 83% binaural hearing loss. The hearing impairment to that degree was probably present from 1965 (report of Dr. Lawrence A. Mazzarella, July 3, 1973, exhibit #66). His progressive hearing impairment over the years does not appear to have been a serious obstacle in his chosen profession. He was employed by various oil companies in managerial capacities and prior to his withdrawal from that field in about 1957, he was a consultant and an officer of Esperanza Petroleum Company for a long period of time.

In 1950 Mr. Miller became a director and treasurer of Manhattan Direct Mail, Inc. (MDM) and subscribed to thirty

shares of stock of the corporation at a cost of \$3,000. MDM is engaged in the business of printing, delivering and mailing letters and catalogs. It lists as its customers, among others, American Airlines, American Broadcasting Company and the Metropolitan Museum of Art. Until Mr. Miller retired from full time activity with Esperanza Petroleum Company, he played a minor role at MDM. MDM was controlled by the Evers family, and in 1953, Mr. Miller married Marie Evers. He succeeded to the presidency of the corporation in 1952. In 1957, his duties expanded to include supervising production and making cost analyses. He was consulted on all management problems. He and his wife owned all the stock of MDM except 4.438%, which was owned by his stepson. From June 1, 1966 until September 1, 1967, MDM paid Mr. Miller \$125 per month and from January 1968 to December 1971 MDM paid Mr. Miller \$140 per month. Prior to June 1, 1966, MDM paid Mr. Miller \$600

<sup>/2</sup> In 1966 42 U.S.C. §403(f)(4)(A)(B) provided:

<sup>&</sup>quot;(A) An individual will be presumed with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing (as provided in paragraph (5) of this subsection) his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

<sup>&</sup>quot;(B) An individual will be presumed with respect to any month, to have rendered services for wages (determined as provided in paragraph (5) of this subsection) of more than \$125 until it is shown to the satisfaction of the Secretary that such individual did not render such services in such month for more than such amount."

per month. In December of 1968, MDM gave Mr. Miller a "bonus" of \$10,000. In December of 1969, 1970 and 1971, MDM gave Mr. Miller a "bonus" of \$5,000 in each of the respective years. The amount of the bonus was arrived at in December of each year after discussion with the company auditor and bookkeeper.

The decedent testified that the bonus was not paid for services rendered in the respective years. He thought it might be "for the past work I did." But he also understood that the payments may have been made upon the advice of the accountant concerning the "desirability of distributing profits."

He testified that from 1957 to approximately May 1966, he spent full time in his duties as principal officer of MDM and performed some laboring work such as operating the folding machine and making deliveries. After May 1966, he states that he went to the plant occasionally spending a total of approximately ten to twelve hours per month, where he just checked the company records, including financial records and sales books. He testified that he participated in the decisions affecting company policy only as a member

See 20 C.F.R. §§ 404.701 and 404.1002-1090.

Old age benefit claimants were permitted to receive a sum not in excess of \$125 per month without deduction for the period ending December 31, 1967. The maximum allowance was increased to \$140 per month beginning January 1, 1968. 42 U.S.C. §403(f) (4)(A)(B).

home from work. The testimony offered by the claiment is in conflict with testimony indicated that the decedent did business with the bank on behalf of MDM on a daily basis until about December of 1970. A report of a Social Security employee indicated that he called at the plant in September of 1971 and was told that Mr. Miller was not there that day but that he had been at the office all day the day before.

A hearing was held before an Administrative Law Judge who found that an employer-employee relationship existed between MDM and the decedent from January 1965 through December 1971. He further found that the decedent performed no services as an employee for the period January 1, 1968 to December 31, 1971 because of his impairment of hearing, "even though the employer-employee relationship was maintained." and that the effective date of decedent's retirement was January 1, 1968.

The Appeals Council modified the decision of the Administrative Law Judge and found that the hearing loss did not prevent the decedent from performing substantial services for the corporation, and held further, ". . . that the bonuses should properly be allocated to all twelve months of 1967, 1968, 1969, 1970, and 1971." The Secretary does not dispute the hearing impairment suffered by the decedent during the subject years. The findings of the Secretary must be sustained "if supported by substantial evidence." 42 U.S.C. §405(g);

Herbst v. Finch, 473 F2d 771 (2d Cir. 1972); Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38 (2d Cir. 1972); Adams v. Flemming, 276 F2d 901 (2d Cir. 1960). A claimant may retire from his employment for the purpose of receiving old age benefits, Runey v. Richardson, 357 F. Supp. 283 (D. S.C. 1972). The Secretary may, in determining eligibility for old age benefits look beyond the form and determine whether in fact the claimant retired, Weisenfeld v. Richardson, 463 F.2d 670, 672 (3rd Cir. 1972). In this case, the Secretary found that the decedent continued to exercise some control over the management of MDM and received wages over and above the permissible maxium for the services rendered. The Secretary determined that Mr. Miller continued to be "the moving force of the operation." Dondero v. Celebrezze, 312 F.2d 677 (2d Cir. 1963). Under the rule state in 20 C.F.R. §404.1004(b) the decedent would be classified as an employee during the subject years. The Secretary found that the bonuses received during the years 1966, up to and including 1971, were "remuneration from employment." 20 C.F.R. §404.1026(a)(2). This finding was clearly within the authority of the Secretary, /3 C.F.R. §404.1004(b) stated in pertinent part:

Corporation officers. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives not is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

Ludeking v. Finch, 421 F 2d 499 (8th Cir. 1970); Newman v. Celebrezze, 310 F2d 780 (2d Cir. 1962). The claimant has the burden cf establishing elgibility for benefits by convincing evidence. Carlson v. Richardson, 331 F. Supp. 1000, 1001 (D. Conn. 1971); 42 U.S.C. §403(b)(4)(A)(B). The Secretary found that decedent's hearing loss, and lessened activity at the plant was insufficient proof in the face of continued management control and payment for the services rendered in the form of bonuses.

Plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.

The Clerk of the Court is directed to enter judgment in favor of the defendant and against the plaintiff dismissing the complaint.

> /s/ Jacob Mishler U. S. D. J.

## William D. Miller, Claimant and Wage Earner Account Number 091-10-1320

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(Claimant)

091-10-1320 Cocid Security Number,

(Wage-Earner) (Leave blank if same as above)

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NO.		GFS	
1	Application for Retirement Insurance Benefits, filed 3/31/66	2	214-215
2	Application for Retirement Insurance Benefits, filed 6/1/66	4	216-219
3	Photostatic copy of "Determination of Award", dated 6/16/66	1	220
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5	Letter from Certified Public Accountant, dated 12/22/66	1	224
6	Letter to claimant, dated 3/15/72	1	225
7	Letter from claimant's wife, dated 3/30/72	1	226
8	Letter to claimant of Reconsideration Determination, dated 7/10/72	8	227-234
9	Letter to claimant, dated 8/16/72 (With an explanation of the reason ard the amounts of overpayments of benefits for the year 1966 through 1970 inclusive)	3	235-237
10	Request for Hearing, filed 9/11/72	1	238
11	Reporting Card signed by Certified Public Account on 12/22/66	5 1	239
12	Annual Report of Barnings, lated 10/16/69, with attached letter	3	240-242
13	Annual Report of Barnings for the year 1969 (3 of them), dated 10/22/70 and 1/19/71 and 2/10/71	1	243
14	Report of Contact, dated 2/10/71	1,	244
15	Statement by William Evers, dated 8/31/71	1	245
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HA-540 (9-72)

HEARING FILE

COURT

(Claimant)

(Wage Earner) (Leave blank if same as above)

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21	Report of Contact with Gerald Goldstein, C.P.A. dated 9/16/71	1	253
22	Report of Contact, dated 9/10/71	1	254
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24	Report of Contact with Metropolitan Museum of Art, dated 10/5/71	1	256
25	Report of Contact with claimant's wife, dated 10/7/71	1	257
26	Report of Contact with the secretary and manager of the Manhattan Direct Mail Company, dated 10/12/71	1	258
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28	Report of Contact, dated 11/1/71	1	260
29	dated 5/19/72	1	261
30	Report of Contact, dated 5/31/72	1	262
31	U.S. Corporation Income Tax Return, Year 1968, Form 1120 (Manhattan Direct Mail, Inc.)	5	263-267
32	U.S. Corporation Income Tax Return, Year 1969, Form 1120 (Manhattan Direct Mail, Inc.)	5	268-272
33	U.S. Corporation Income Tax Return, Year 1970, Form 1120 (Manhattan Direct Mail, Inc.)	4	273-276

(Wage Earner) (Leave blank if same as above)

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35	U.S. Individual Tax Return, Year 1966, Form 1040 (William Dana Miller)	4	281-284
36	Wage and Tax Statement, 1966 (William Dana Miller)	1	285
37	U.S. Individual Tax Return, Year 1967, Form 1040 (William D. and Marie E. Miller)	5	286-290
38	Wage and Tax Statement, 1967 (William D. Miller) and Wage and Tax Statement, 1967 (Marie B. Miller)	1	291
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40	Wage and Tax Statement, Year 1968 (William Dana Miller) and Wage and Tax Statement, Year 1968 (Marie E. Miller)		296
,41	U.S. Individual Income Tax Return, Year 1969, Form 1040 (William D. and Marie E. Miller)	6	297-302
42	Wage and Tax Statement, 1969 (William D. Miller) and Wage and Tax Statement, 1969 (Marie E. Miller)	) 1	303
43	U.S. Individual Income Tax Return, Year 1970, Form 1040 (William D. and Marie E. Miller)	8	304-311
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46	Wage and Tax Statement, 1971 (William Dana Miller) and Wage and Tax Statement, 1971 (Marie Evers Miller)	1	322

HA-540 (9-72)

Camant,

(Wage Barner) (Leave blank if same as above

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48	Transcript of Earnings Record, January 1965 through June 1972, certified 3/21/73 (Clt.)	2	324-325
49	Earnings Record - P.I.A. Determination, dated 4/2/73 (Clt.)	1	326
50	Transcript of Earnings Record, Marie Stich Miller, 1965 - June 1972, certified 3/21/73	2	327-328
51	Transcript of Earnings Record, Marie Stich Miller, January - September 1972, certified 6/5/73	2	329-330
52	Transcript of Earnings Record, William D Miller, (Clt.) January - September 1972, certified 6/5/73  RECEIVED FOR HEARING	2	331-332
53	Photocopy C. Ferchase Agreement from E.N. Tabin, dated 3/30/7	3 1	333
54	Photocopy of: Certificate of Incorporation of Manhattan Direct Mail with attached notification from Department of State, New State, Dated 1/30/50; Minutes of Directors Meeting dated 2/16 Resolution; Minutes of Meeting dated 1/22/52, Western Union T gram dated 12/11/51 and Resolution; and Minutes of Meeting dated 1/22/52; Minutes of two meetings both dated 3/1/55	York /50,	334-345
55	U.S. Corporation Income Tax Return, 1966, Manhattan Direct Mail, Inc.	6	346-351
56	U.S. Corporation Income Tax Return, 1967, Manhattan Direct Mail, Inc.	6	352-357
57	U.S. Individual Income Tax Return, 1966, Form 1040, William Dana Miller	8	358-365
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64 Series of eight photographs of a Folding Machine	/1' 421-
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mazzarella, M.D., dated 7/3/73	
67 Series of quotes from dictionaries and books on chemistry and pharmacy	1 449
68 Photocopy of two checks signed by U.S.	- 449
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70 Photocopy of Purchase Agreement from Beltone Hearing Servi dated 9/5/68 and cancelled check dated 9/6/68	ce 1 452
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William D. Miller

(CLAIMANT)

(SOCIAL SECURITY NUMBER)

(WAGE EARNER) (LEAVE BLANK IF SAME AS ABOVE)

AC EXHIBIT LIST

EXHIBIT NO.

DESCRIPTION

DESCRIPTION

DESCRIPTION

AC-1

Letter from Attorney with Memorandum dated June 14, 1974.



## DEPARTMENT OF HEALTH, EDUCATION. AND WELFARE SOCIAL SECURITY ADMINISTRATION

7

BUREAU OF HEARINGS AND APPEALS

HA:C 091-10-1320

August 21, 1974

Mr. William D. Miller 661 Todt Hill Road Staten Island, New York 10304

Dear Mr. Miller:

Enclosed is a copy of the decision of the Appeals Council on your claim under the Social Security Act.

If you disagree with the enclosed decision and desire a review by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside within from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)). Where claim is for supplemental security income see also section 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 1383(c)(3)) and where claim is for medicare see also section 1869(b) of the Social Security Act, as amended (42 U.S.C. 1395ff.(b)). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

If you have any questions, your social security office will be glad to help you.

Sincerely yours,

H. Dale Cook Chairman, Appeals Council

Enclosure
cc:
Mr. Charles Marks
Attorne / Law
New York, New York 10001

DEPARTMENT OF

#### HEALTH. EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of Claim for Old-Age Insurance Benefits (Deductions)

(Claimant) (Deductions) (Social Security Number)

This case is before the Appeals Council on its own motion to review the decision of the administrative law judge issued on February 28, 1974.

In his decision, the administrative law judge found in effect that deductions are applicable against the claimant's old-age insurance benefits for all months January 1966 through December 1967; that deductions are not applicable against the claimant's benefits for the months January 1968 through December 1971; that the claimant has been overpaid benefits, and that recovery of the overpayment may not be waived.

Evidence in addition to that before the administrative law judge consisting of a letter to the Appeals Council from the claimant's attorney dated June 14, 1974, and an accompanying memorandum have been entered into the record by the Appeals Council and identified as Exhibit AC-1.

#### STATEMENT OF THE ISSUES

The general issues before the Appeals Council are whether deductions are applicable against the claimant's old-age insurance benefits for any month January 1966 through December 1971; whether he has been overpaid, and, if so, whether recovery of the overpayment may be waived under section 204(b) of the Social Security Act. Specifically at issue is the amount of annual earnings for the years 1966 through 1971 and whether the claimant, in his capacity as president of a family corporation, rendered services for wages in excess of \$125 monthly for any month January 1966 through December 1967 and in excess of \$140 in any month January 1968 through December 1971.

#### STATEMENT OF THE LAW AND REGULATIONS

Sections 203(b) and (f) of the Social Security Act, as applicable to taxable years 1966 and 1967, provided that a beneficiary under age 72 could earn \$1,500 in a taxable year, without suffering a loss of benefits. For the first \$1,200 of earnings in excess of \$1,500, deductions were imposed at the rate of \$1 of benefits for each \$2 of earnings. Where earnings exceeded \$2,700, deductions were imposed at the rate of \$1 of benefits for each \$1 of earnings. No deductions were imposed for a month in which a beneficiary neither rendered services for wages in excess of \$125 nor rendered substantial services in self-employment.

Sections 203(b) and (f) of the Act, as applicable to the taxable years 1968 through 1972, provided that a beneficiary under age 72 could earn \$1,680 in a 12-month taxable year without suffering a loss of benefits. For the first \$1,200 of earnings in excess of \$1,630, deductions were imposed at the rate of \$1 of benefits for each \$2 of earnings. Where earnings exceeded \$2,880 deductions were imposed at the rate of \$1 of benefits for each \$1 of earnings in excess of \$2,880. No deductions were imposed for a month in which a beneficiary neither rendered services for wages in excess of \$140 nor rendered substantial services in self-employment.

Section 404.1026(a) of the Social Security Administration Regulations No. 4 provides that the term "wages" means all remuneration for employment unless specifically excepted under section 209 of the Act. The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, and bonuses are wages within the meaning of the Act if paid as compensation for employment.

Section 204(a) of the Act requires that where erroneous payments of benefits have been made to an individual, such overpayment must be recovered.

Section 204(b) of the Act provides that recovery by the United States of an erroneous benefit payment may be waived if certain circumstances prevail, i.e., if the overpaid individual was "without fault" in accepting the overpayment and if recovery would defeat the purpose of title II or be against equity and good conscience.

Section 404.507 of Regulations No. 4 provides that what constitutes fault on the part of the overpaid individual depends upon whether the facts show that the incorrect payment to the individual resulted from:

- (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
- (b) Failure to furnish information on which he knew or should have known to be material; or
- (c) Acceptance of a payment which he either knew or should have been expected to know was incorrect.

Section 404.508 of Regulations No. 4 defines "defeat the purpose of title II" as meaning "to deprive a person of income required for ordinary and necessary living expenses."

According to section 404.509 of Regulations No. 4 "against equity and good conscience" means that recovery of an overpayment will be considered inequitable if the individual has by reason of the overpayment relinquished a valuable right or changed his position for the worse.

#### EVIDENCE CONSIDERED

The evidence before the administrative law judge, the evidence subsequently received, and the testimony at the hearing have been carefully considered by the Appeals Council.

#### EVALUATION OF THE EVIDENCE

The claimant was born on January 6, 1900, and filed applications for oll-age insurance benefits on March 31, 1966, and June 1, 1966. The first application was an abbreviated one eliciting only enough information to entitle the claimant to hospital and medical insurance benefits. In the June 1, 1966, application the claimant stated that his expected 1966 earnings were \$4,125, but he did not expect to earn over \$125 in any month from June 1966 on. Accordingly, benefits were paid beginning June 1966.

Subsequently, it came to the attention of the New York payment center that maximum earnings had been credited to the claimant's earnings record for the year 1968 and development was initiated to determine whether he had, in fact, retired effective June 1966. Development revealed that the claimant remained the president of Manhattan Direct Mail, Incorporated, 122 Duane Street, New York, New York, a family corporation engaged in direct mail advertising. The corporation tax returns for the years in question show that the claimant owned 47.826 percent of the stock and devoted his full time to corporate business; that his wife owned 47.826 percent of the stock, his stepson the other 4.348 percent; and that they too devoted their full time to corporate business.

The claimant has been president of Manhattan Direct Mail, Incorporated since 1952. Testimony adduced at the hearing was that his wife and stepson are more familiar with the printing and sales functions of the business and the claimant with the administrative functions, such as cost studies, and that he retired in June 1966 because a hearing loss seriously impaired his job performance.

The administrative law judge found that the claimant's nearing loss was such that it prevented him from working beginning January 1968. The Appeals Council does not concur in this finding. The claimant's hearing loss did not prevent him from testifying at his hearing. Perhaps it does hamper his operation of printing equipment and his use of the telephone, but it would have no effect on his ability to do paperwork and to give advice and consultation, which have been his main functions in the Corporation. Also, after the claimant was paid a low salary the last seven months of 1966 and all months of 1967, the Internal Revenue Service allegedly questioned the large undistributed profit of the business. Thereafter, in December of each year the claimant was paid a "bonus" to compensate him for the time and money he had invested in the company during prior years. In 1968, the bonus was \$10,000 and in each succeeding year it has been \$5,000. The total yearly wages reported for the claimant during the applicable years were \$4,125 in 1966, \$1,500 in 1967, \$11,680 in 1968, \$6,680 in 1969, \$6,680 in 1970 and \$6,680 in 1971.

Despite the testimony of the claimant and his family that he has seldom gone to the office since May 1966, in September 1971, the manager of the Chemical Bank in New York City, stated that the claimant still signed accounts for Manhattan Lirect Mail, Incorporated, and that through about December 1970 the claimant had come to the bank almost every day to transact official business.

Also in September 1971, a social security employee contacted the corporation and was told by the claimant's wife that though he was not in the office on that particular day, he had been there all day the day before.

In the opinion of the Appeals Council, the evidence of record does not support the claimant's contention that he retired in June 1966. Rather, it appears that he knowingly arranged his wage and bonus payments so as to evade deductions against his social security benefits. His contention that he did not actually receive more than \$140 a month in any month except December 1968, 1969, 1970 and 1971 does not fulfill either the spirit or the letter of his obligation under the law.

The so called "bonus" represents a deferred payment of wages part of which he earned in each month of the year. Even though the claimant was paid only \$140 a month except in December 1968, 1969, 1970, and 1971, deductions under sections 203 (b) and (f) of the Act are based on the time that wages were earned. As the claimant was not paid a bonus in 1967 but twice the amount of his usual bonus in 1968, the Appeals Council finds that one-half his 1968 bonus is allocable to 1967. Thus, his total earnings for deduction purposes during those years are \$6,500 in 1967, and \$6,680 in each year 1968 through 1971. The Appeals Council further finds that the bonuses should properly be allocated to all twelve months of 1967, 1968, 1969, 1970 and 1971. (Social Security Regulation: 74-la (January 1967)). As the services performed by the claimant in the months June 1966 through December 1966 did not differ rrom those performed in prior and subsequent months, the Appeals Council finds that his earnings for deduction purposes were at least \$6,500 in 1966 and that his earnings exceeded \$125 in each month of the year.

Thus, all old-age insurance benefits paid to the claimant for the period June 1966 through December 1971 were erroneous, constitute an overpayment, and the Appeals Council so finds. (The claimant attained age 72 in January 1972, and deductions are not imposable against his old-age insurance benefits for any month beginning with January 1972.)

The overpayment of benefits to the claimant was a result of his failure to furnish to the Social Security Administration information about the true nature of his salary payments. Therefore, he cannot be found to be "without fault" in accepting the erroneous benefit payments, and the Appeals Council so finds.

The finding that the claimant was not "without fault" precludes waiver of recovery of the erroneous benefit payments. However, the evidence of record indicates that recovery of the overpayment would not deprive the claimant of the necessities of life, and the Appeals Council so finds.

There is no indication that the claimant relinquished a valuable right or changed his position for the worse in reliance on the erroneous benefit payments. Therefore, the Council finds that it would not be against equity and good conscience to recover the overpayment.

#### SUMMARY OF FINDINGS

After careful consideration of the evidence of record the Appeals Council makes the following findings:

- In each year, 1966 and 1967, the claimant's total earnings were \$6,500, and his monthly earnings exceeded \$125 in each month of the year
- 2. In each year 1968 through 1971 the claimant's total earnings were \$6,680, and his monthly earnings exceeded \$140 in each month of the year.
- Deductions are applicable against the claimant's old-age insurance benefits for the months January 1966 through December 1971.

- 4. The claimant was overpaid benefits for certain months in the period June 1966 through December 1971.
- in accepting the erroneous benefit payments and recovery of the overpayment would neither defeat the purpose of title II of the Social Security Act nor be against equity and good conscience.

#### DECISION OF THE APPEALS COUNCIL

It is the decision of the Appeals Council that deductions are applicable against the claimant's oldage insurance benefits for the months January 1966 through December 1971; that he was overpaid benefits in that period; and that recovery of the overpayments may not be waived. The decision of the administrative law judge is so modified.

APPEALS COUNCIL

Carl Monk, Member

Norman S. Kerns, Member

Date: #110 9 1074



## DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE SOCIAL SECURITY ADMINISTRATION

P.O. BOX 2518, WASHINGTON, D.C. 20013

BUREAU OF HEARINGS AND AL

REFER TO:

TEA-2 091-10-1320 MAY 2 1974

Mr. William D. Miller 661 Took Hill Road Statem Island, New York 10304

Dear Mr. Miller:

The Appeals Council, on its own motion, has decided to rev the hearing decision on your claim.

The administrative law judge found that work deductions or not imposable against your old-ago insurance benefits for the months January 1968 through December 1978. The Appeal Council wishes to make a careful study of the record to determine whether it supports the conclusion that you did not render services for wages of over \$140 monthly during this period. It appears that you continued to render services for Manhattan Direct Hail, Incorporated through December 1971, and that you continued to receive remneration your services of over \$140 per month. Newswer, the Agreement will cerefully consider any additional evidence, written statements, and/or oral argument you may wish to present.

If you have any evidence not previously sumplied, or wish to make a further written statement as to the facts and lain your case, you may submit either or both by mail to the Appeals Council. You should do so within 20 days from the date of this letter, or inform us within that time when it may be expected.

If you desire, you may appear in person before the Appeals Council in Arlington, Virginia, to present oral argument of your case. Or, you may have someone represent you and appear with you or alone, for this purpose. If you and/or your representative want to appear, please inform as within

20 days from the date of this letter, and you will be sent a notice of the time and place of such appearance. You need not write to us if you do not want to appear or if you do not want to submit anything additional.

The decision of the Appeals Council will be based upon the facts disclosed by all the evidence and the provisions of law which must be applied in your case.

Sincerely yours,

Member. Appeals Council

Main Menio

Member, Appeals Council

Mr. Charles Marks Attorney at Law New York, New York 10001

## SOCIAL SECURITY ADMINISTRATION BUREAU OF HEARINGS AND APPEALS

Mr. William D. Miller 661 Todt Hill Road Staten Island, New York

10304

Charles Marks, Esq. 286 Fifth Avenue New York City 10001

## PLEASE READ CAREFULLY

The enclosed decision of the hearing expansions is favorable to you, either wholly or partly. If you are satisfied with this decision, there is no need for you to do anything at the present time. Further action on the decision will proceed automatically.

If you disagree with the decision, you have the right to request the Appeals Council to review it within 60 days following the date shown below. A request for review may be filed by you (or your representative) at your local social security office, or it may be filed with the bearing as a substitution of the council.

The Appeals Council may decide on its own motion within 90 days following the date shown below to review and possibly to change the decision. If the Appeals Council decides to review the decision on its own motion, you will be notified promptly.

Un. 3s you file a timely request for review by the Appeals Council or unless the Appeals Council reviews the decision on its own motion, you may not obtain a court review of your case under sections 205(g) and 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing

February 28, 1974

# DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE SOCIAL SECURITY ADMINISTRATION BUREAU OF HEARINGS AND APPEALS

21

#### HEARING DECISION

In the case of

William D. Miller

(Claimant)

(Wage Earner Leave blank if som is above)

Claim for

Old-Age Insurance Benefits (Deductions)

091-10-1320 (Social Security Number)

ASHLEY, Administrative Law Judge: Pursuant to the appeals provision of Title II of the Social Security Act, as amended, 42 United States Code 405(b) the claimant herein sought a hearing for a decision on an application filed on March 31, 1966 for Old-Age Insurance benefits, 42 United States Code 402(a) with the Social Security Administration. A Certificate of Social Insurance Award was granted on June 16, 1966; this provided for a monthly benefit commencing with the month of March 1965. On December 9, 1966 the claimant was notified: "Since your recent notice shows that you expect earnings for this taxable year to be more than \$1500, we have stopped benefit payments beginning December 1966." On March 15, 1972 the claimant was notified: "We are stopping benefits effective March 1972 until it can be determined that you actually retired when you alleged." The claimant requested a reconsideration. The "Administration" notified the claimant on July 10, 1972: "Upon reconsideration, it is determined that Mr. Miller had earnings of \$6,680 for 1966 and 1967 and that his wages exceeded \$125 for each month of 1966 and 1967. It is determined that he had earnings of \$11,680 for 1968, \$6,680 for 1969, \$6,680 for 1970 and \$6,680 for 1971, and that his wages exceeded \$140 for each of these years. It is additionally determined that the claimant has been overpaid all Retirement Insurance benefits authorized to him from June 1966 through December 1971....The overpayment of Retirement Insurance benefits to Mr. Miller was caused by his failure to submit annual reports of his earnings when required or to submit accurate reports of his true earnings. It cannot be found that he acted in good faith or that he exercised a high degree of care in reporting his earnings. Under 'he circumstances, it is determined that Mr. Miller is not without for t in causing the overpayment. Recovery of the overpayment will not cause undue financial hardship or be otherwise inequitable." On August 16, 1972 the claimant was notified that he owed \$8,267.60 and that this sum would be recovered from the benefits normally payable to him for the period March 1972 through May 1975 and part of June 1975. ... As you were paid benefits for all months of

those years (1960, 1967, 1968) except December 1968, you were overpaid as follows: \$928.90 in 1966, \$1,592.40 in 1967, \$1,632.70 in 1968, \$1,912.80 in 1969 and \$2,200.80 in 1970." Still being aggrieved by this determination, the claimant filed a formal request for a hearing on September 11, 1972. Appellant invokes jurisdiction under the stated statutory provision. The appeal has been seasonably perfected.

A plenary hearing on the merits, de novo, came on regularly to be heard on June 20, 1973 and August 8, 1973. The claimant appeared in person, testified in his own behalf, and produced three witnesses in support. It appears from the record on appeal that the claimant, born on January 6, 1900 was 65 years of age in January 1965 and reached his 72nd birthday on January 6, 1972.

The issues for decision are:

1. Whether the claimant's benefits was subject to work deductions under the Social Security Act, as amended, (42 <u>United States Code</u> 403) for any month during the calendar years 1966, 1967, 1968, 1969, 1970, 1971.

2. Whether the claimant earned over \$125 a month in any month in 1966

and 1967 and over \$140 a month in 1968, 1969, 1970, 1971.

3. Whether the annual and quarterly earnings reported in the records of the Social Security Administration are accurate and complete.

4. Whether an overpayment, if any, should be recovered by the "Administration".

The claimant testified in essence as follows: (Examination by Attorney): He lives at 661 Todt Hill Road, Staten Island, New York with his wife, Marie Evans Miller. His step-son is William L. Evers. The witness was born January 5, 1900. He has no children with his marriage to Mrs. Miller. By profession he is a Geologist. He graduated the University of Chicago in 1919 and received a Bachelor of Science degree in Geology. In 1920 he started to work for the Gulf Oil Corporation, initially in the United States and then later on in Columbia, South America. He was an exploratory pertoleum geologist. He "surveyed the country with instruments. Looked at the rocks, put them down on maps and then at the end of the battempted to evaluate whether they were oil-bearing possibilitie the territory." He contracted malaria in the 1920's. He was h .alized in Korazon in 1921 and 1922. He contracted malaria and the efore over a long period of time had to take a considerable quanity or quinine. He has had recurrences of malaria. He still takes "plenty of quinine". Then in 1925 he went to work in New Zealand and Australia for an oil investigation company. He did the work as a geologist, for the El Dorado Petroleum Corporation, and was in charge of engineering for development in Venezuela, South America. He worked for the Esperanza Oil Corporation until 1957. He was the Vice-President and General

Manager of this company in 1957. The company had about a million acres in oil concessions in Venezuela. He was the chief geologist and chief engineer and had to survey the whole country. He also paid the taxes for the company, and negotiated with the Venezuelan government in the development of the land. He has spent 30 years as an employee of the Esperanza Oil Company. After 1957 he only worked for it occasionally as a consultant. For this he received no money. In 1957 he began to get an annuity from a life insurance company. The last time he went to Venezuela for the Esperanza Petroleum Company was about 1957.

Further: It was in 1950 that he became associated with the Manhattan Direct Mail Company. He married Marie Evers in August 1953. The business of the Manhattan Direct Mail Company is printing. Letters are sent to the post office in bulk amounts. The company does photographic work. He knows nothing about photographic machines. On the business premises there are about 26 different types of machines. About six of them are multilith of various sizes. There are also folding machines, and inserting machines. The company does work for American Airlines, The Metropolitan Museum of Art, and the American Broadcasting Company. The company does chiefly letters and catalogs. It is located at 122 Duane Street, New York City, and occupies around 6,500 sq. feet on the 3rd floor with an area of 56x125. He has never been known by the first name of "Bill", sometimes is known as "Dana" Miller. He has never directly dealt with the Metropolitan Museum of Art.

Further: In 1950 and 1951, Manhattan Direct Mail had a man named Brown as the General Manager. In the winter of 1951 his services were terminated. The witness received no salary when he first became associated with the Manhattan Direct Mail in 1950. Then about seven years later in 1957, after he retired from the Esperanza Petroleum Company, he started to get a salary. From 1950 to 1957 he was a "jack of all trades" in the business of Manhattan Direct Mail. He did delivery work, a certain amount of folding machine work, "I think chiefly the work I did was to ride herd on the books." Starting with January 1952 when he became president and treasurer, the kind of executive work he did was to discuss with the directors the purchase of new machinery and the source of the new money. He had very little discussion about hiring or firing people. He "probably" participated in decisions relating to wage increases. "I tried to check in what our job was costing us and I would use a calculating machine on that, so many hours spent on a job, so much per hours, and we turned out so many pieces of material per hour, so forth and so on. I did a certain amount of that work." He also did a little time checks. From 1950 to 1957, at any one time there were between 12 to 20 employees. On an average there are about 16 or 17 people working there. On an unrecalled time after 1952 when Mr. Nelson died, his estate offered the stock previously held by him to the corporation; it was accepted. The amount

paid was \$50 a share. On March 1, 1955, the sole stockholders of the business was the claimant, his wife and William Evers. They were also the sole directors.

Further: From 1950 to 1957 some weeks he worked 25 hours, other weeks 30, sometimes 40 hours per week, and on an occasional weekend, run it up to 50 or 60 hours a week. In the early 1950's he was called upon to provide capital for the operations of the business. Many times he had to put up money to meet the payroll and also to buy different machines. These machines ran to about \$1,200 apiece and totaled about \$500,000 all together. When he had to meet the payroll he would put in about \$1,500 a week in those days. Sometimes he had to meet the payroll on a number of consecutive weeks. After he retired from payroll on a number of consecutive weeks. After he retired from Esperanza Petroleum Company in 1957 and up until about 1960, he continued putting in the same hours a week for the Manhattan Direct Mail Company. He was not required to put in any particular number of hours a week.

Further: In May 1966, just before he retired, he was "more or less a delivery boy, and ran a machine or two now and then." This was a folding machine. Up to May 1966 he was authorized to sign company checks. In May 1966 he suffered an impairment of his hearing. He had to have a special telephone installed. It was difficult to maintain a watch on the folding machine because he couldn't hear the noises of the machine. If there was a telltale sound coming from the machine and he didn't do anything about it there was a very real possibility that "the machine could fly into a dozen pieces". He had a telephone attachment to assist his hearing at his home telephone, but not in the office. He was not able to handle telephone conversations in the office after 1965 or 1966. He had to buy a wiple series of hearing aids. The first one cost him \$715 on November 27, 1965, then on December 5, 1966 he bought another one, (for \$758), then another one on August 1, 1967 (for \$599), then another one in 1968, (for \$860). By this time he had to have hearing aids for both ears. This was only partially effective. Then he bought another one on March 20, 1973. In August 1973 he had an examination by a "certified audiclogist". He was advised that he had between 80 and 82% impairment to his hearing.

Further: In 1966 his step-son had a considerable amount of matrimonial difficulty. His step-son's wife spent a good deal of time away from the house and she also suffered a mental impairment. Ultimately his step-son and his wife were divorced, in 1966. The custody of the children (4 daughters) were made to the father, (claimant's step-son).

Further: Up to the time that the claimant retired, (up to May 1966) he was living on Riverside Drive. Then in late 1966 he moved to Staten Island where he presently lives. The house that he moved into was occupied by his step-son, his step-son's wife and the children. After May 1966 he spent more and more time at the house. This was a direct

result of the deterioration of the martial status of the step-son and the step-son's wife. For about 3 years he supervised the children at this house. His step-son remarried in the spring of 1971. Then there came a time when the step-son moved out of the Staten Island residence and took his children with him. The step-son resides in a different house, but still in Staten Island. At the time that the claimant moved to the Todt Hill residence in Staten Island, his step-son changed the ownership of that house to the claimant and to the claimant's wife. At the present time the claimant owns the house.

Further: Up to May 1966 the claimant was receiving \$600 a month from the company. After May 1966 it was reduced to either \$135 or \$140 a month. After May 1966 he took "very little" part in the business of the company. This consisted of "mostly consultation with the family after they got home." They talked about raising or lowering wages and what to buy for the company. After May 1966 "I doubt if I spent in the business itself just a ... hours in the whole month." This means about 10 or 12 hours a month. The same thing for 1967 and approximately the same for the year 1968 through 1971. When he went to the company "I checked the company records, I looked through the sales book and checked the finances of the company." Apart from that he did not participate in the operation of the company and did not operate any equipment after May 1966. He has not touched the folding machine or any other machine since 1966 or 1967, except perhaps the calculating machine. He operated the calculating machine "not more than just an hour or so at any one time." From 1966 to 1971 he received various payments from the company. "Maybe it was for the past work I did. Certainly I was not doing any work that was worth any sizeable sum of money for the company during those years. So therefore it must have been for some past work that I had. That was more or less the theory as best as I can figure." In 1968 he received \$11,680. This was \$10,000 in excess of the \$140 a month which was the exempt amount in 1968. The additional \$10,000 was: "I would say that it was probably for some of those rendered services back in the older days there." He did discuss this amount with his wife and his step-son but he did not talk about it with his accountant. The accountant said something about "the desirability of distributing profits." In 1969 and 1971 the amounts that he received over and above the permitted amount, which was a \$5,000 excess for each of the years was done on a similar basis. From 1966 through 1971 he was always the president "but I spent no time at the office." "I am president but I don't do any-

## The claimant's wife testified in estate as follows:

(Examination by Attorney): The name of her employer is the Manhattan Direct Mail Company. She works at a printing and mailing occupation.

"We take copy and we take pictures." She is a director and officer

of Manhattan Direct Mail. She become a director and secretary on February 6, 1950 and has continued in that capacity to the precent day. "We will take copy and we will set type composition, whatever is required, or we will take photographs and make them into half tones ... We take any kind of material that is to be printed ... After it is printed, we fold it and mail it and pack it and ship it or deliver it. The company maintains list of customers." The customers tell her which one of their lists they want to use for a particular mailing or they will give the company a list and the company would type the list. "We follow their specifications to do with the material after we've printed it." Then she is concerned with the mailing of that material. The claimant began working with Manhattan Direct Mail after he retired from the Esperanza Gil Corporation at 120 Broadway, New York City in 1958. He worked on a limited basis prior to that time with Manhattan Direct Mail. His work started around 1950, when the corporation was formed. He was with Manhattan Direct Mail "for a few more years, about 1966, maybe." He never actually worked full time. From 1950 up to 1958, when the claimant retired from the Esperanza Oil Company, his work was always less than 40 hours a work, usually about 20 hours a week. He used to do folding. "I would say he would be there maybe two, three full days a week. This was approximately 25 to 30 hours a week. He was not at Manhattan Direct Mail after about the middle of 1966, he did not work there." claimant "operated the folding machine and did certain executive things like sign checks and had something to do with policies, whether we hired and fired, and helped us with our deliveries." The claimant advised "with the salaries and employment." He had something to do with the purchase of equipment. "He bought it sometimes and again we discussed what we needed." He was generally concerned with the making of management decisions and policy for Manhattam Direct Mail. It was necessary for him to carry on conversations over the telephone and with other people. On each check there were two signatures required. The witness's home telephone number is in the telephone directory as an alternative telephone number for Manhattan Direct Mail. "We get calls Saturday, Sunday, Monday, early morning and late at night. People want to make deliveries so they're asking where the shipment is and things like that." There would not be any point in the claimant responding to the telephone "because he can not hear them." In examining the payroll record for 1966 the following are the payments made to the claimant: "\$650 a mouth for January, February, March and April 1966. It also shows \$125 a month for June through December respectively for 1966. In the year 1968 the corporation paid him \$140 a month for each youth in 1968. On December 29, 1968, the record shows that \$10,000 was paid to the claimant. This was a lump-sum. For the year 1969 and 1970, for each month the claimant was paid \$140 a month. January in the year 1969 he was paid \$140, then January 25 \$31.00 and February 2 \$31.00. February 15

\$31.00, February 22 \$31.00, then march 1969 the record shows \$125, then April 1969 \$140." The witness was not able to find any records showing for the rest of the year 1969. The next month for which she has records is April 1970; and in April 1970 the record shows the claimant was paid \$140 and May \$140, June and July and August and September, October, November, December, each month was \$140 payment to the claimant. The record show for the year 1971 the claimant was paid \$140 for each month in the year 1971.

Further: Beginning June 1966 and through 1971 the claimant remained an officer of Manhattan Direct Mail. The claimant did not perform any services after 1966, "Q: Beginning with June 1966 through 1971, what was the occasion for making the payments that you've just testified to? A: Well, they were in a way repaying funds that we had been receiving from him for this period of time. It was more or less a repaying money that we had been receiving from him." It was about in April or May of 1950 that was the first time that the claimant had made payments to Manhattan Direct Mail to meet the payrolls. "We did not start out with enough capital, as we found to our sorrow, and we found further that the more successful we got the more money we needed." In 1950 there was about a \$1,000 a lack. "It was not every week but it would be very suddenly now and then. It could be at least once a month." The claimant helped the company buy the equipment. These monies were advanced by the claimant to the company with his own personal funds. "I just den't think there was" any record kept of those payments. The company's bookkeeping practices was very informal. From time to time the claimant lent the company money to buy time machines, typewriters, and a tieing machine. This folding-tieing machine cost about \$1,500 total. The claimant advanced the cost of the folding machine. This was purchased around 1954. The payments that the witness made to the claimant during the period June 1966 through 1971, (both the monthly payments and the lump-sum payments at the end of every year) were paid in recognition of the earlier contributions, that is, the financial contributions which the claimant made "to the survival of Manhattan Direct Mail." The witness does not recall that the claimant was ever repaid these loans or advances.

#### (Examination by Judge)&

The company gave \$140 a month or \$125 a month to the claimant because he was nice enough to keep the company's head above water during the early years of its existence. She is of the opinion that each one put in about \$15,000 apiece. The claimant advanced his ern personal money from time to time, to the corporation. The witness has been a corporate officer for 20 years. She doesn't know why the amount set was \$125 a month to \$140 a month. The one who made that decision was the auditor who was handling the books for the company. "I suppose

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it was a combination of how much we could afford to add to our mouthly expenses and it was just apportioned out that way in order to give him back some money and not take more than r. could afford to give him."

8

Further: During 1968, 1969 and 1970 the claimant was occasionally on the business premises but "not to work." He would "show up maybe an hour or two once a week or so, to pick me up and to take me home or something like that." There came a time when he stopped actually operating the folding machine and making deliveries, and this was in the middle of 1966. She remembers this because at that time there was a serious family problem and in addition the claimant's hearing had "gone very, very rapidly downbill." Additionally, "it was dangerous to have him back there and then we had another situation arise when he was needed even more on the folder which was too damgerous for him to handle at that time." It was in May of 1966 that he stopped doing any work at all on the business premises of Manhattan Direct Mail. He no longer did deliveries, did not operate the folding machine or answer any telephone. It was "because at that time he was not able to communicate with the people in the plant and that was rather a disturbing and not too pleasant for him. And then there were occasions on the folder that he " ' himself that he was just not up to it anymore." "I think he more or less decided himself that he just was not capable of serving the company in any way." Ine claimant just did not come to the plant any more and the company had no occasion to call him. "He just knew he could not work there anymore." He had no set time to come in; nor to leave. He would just come in to pick up something or bring in something or meet the witness to take her home. He had no set duty to perform. The company's confidence in the claimant was shaken because "he just does not hear. He can hear me but most people, he can't hear." It was his extreme difficulty in communicating with the employees; plus his difficulty in knowing when the machine was on and when it was off. "Nore than ever we did not know if he understood what we were saying and that caused confusion." She remembers that this particular "cutoff doe" was May 1966 "because something important or significant happened in their own family."

# (Re-examination by Counsel):

This is a family business. The principles in the business from June 1966 through 1971 consisted of the witness, her husband (the claimant), and the witnesses son. All the policy decisions in the business were made informally, as a family matter. In 1966 the claimant "might have come in once a month. Later on it was less than that, it might be three months before he came in." In 1970 the claimant would come into the plant maybe once every 2 or 3 months. During this time he would stay about an hour. It never was more than an hour or two. Occasionally

it may have been twice a month. This also applies to the year of 1971. According to the payroll records for the time June 1966 though December 1971, the nomice given to the claimant was put month the column of "Harnings" because "that was the way the form is made out."; but "it was not payment for work." It was a convenient place to set forth the payments which were made to him.
"It was not earnings as such."

## (Re-examination by Judge):

In order to give some recognition of the money advances that the claimant made during the early years of the business, it was decided by the corporate officers to give him \$125 a month and then after \$140 a month. "That decision was made on the basis of our monthly payroll and what our accounts showed." "I don't know if we thought we could not afford to. I think we thought we need to, because we have to keep a certain reserve and we were probably balancing what we had with what we could do."

Further: The witness and her son and the company auditor and the bookkseper of the books discussed the amount to be given to the claimant. When the consensus arrived at \$10,000 in December 1968, and \$5,000 in December of 1969 - "That was from the pictrre that we had before that we thought that we could do." The witness does not recall whether she got a bonus in 1971 and 1972 or whether her son got a bonus. During the years she had no idea of the total amount that her busband loaned to the company during the early years. In order to get the amount she would have to go back over the records and figure out the particular emergencies and the different machines that were bought and different things that had to be paid at certain times. Then she could come to a total. The claimant was never paid back the same year that he made the advances. For the year 1950, the claimant probably advanced around \$2,500 or \$3,000. The total amount down through the years may have amounted to \$12,000 in all. She has no idea why the figure of \$10,000 was arrived at. The auditor had been there working for the company since around 1951 and "he had a pretty good idea of what was going on." So I should say it was a pretty good estimate of approximately of what it might be. I do not know if it was interest added and all that business." "We would not have been there if it had not been for what he had done for us. We would never have survived. So how do you estimate that in dollars and cents, is som thing I cannot do."

# (Re-examination by Counsel):

She did not think that when the money was paid to her husband, the claimant, that the monies were taken out of her own pocket.

The step-son of William Dana Miller, testified im essence as follows: (Examination by Attorney): He lives at 79 Jewett Avenue, Staten Island, New York. He is an attorney. he presently works for the Manhattan Direct Mail Company as the corporate secretary. He does not practice law. He does the general management of this company. Marie Miller is his mother, and William Dana Miller, is his step-father. He began with the company in 1951 after he passed his bar examination. From 1966 to 1971, he was employed at the company as a corporate secretary. Prior to that time, he worked for two law firms, the last one was about 1963. Subsequent to 1963, he worked full time for the Manhattan Direct Mail Company. William Dana Miller is his step-father and worked up until 1966 for the Manhattan Direct Mail Company. When the company was started, the claimant, William Dana Miller, was an oil geologist. He continued his main work efforts with this oil company. But to the Manhattan Direct Mail Company, William Dana Miller was the financial adviser and counselor. After the claiment retired in 1958 from this oil company, and up to May 1966, the claimant worked at the Manhattan Direct Mail Company, at least 8 or 9 hours a day and usually 7 days a week. The claimant ran a folding machine, handled trucking and delivery problems. Sometimes he had to take mail to the airport on Sundays. He kept the production schedule and kept timing records and schedules. He communicated with other people in the plant and he telephoned customers. The services of William Dana Miller were terminated in May 1966.

Further: The witness had trouble with his wife on many occasions. She had been examined by a number of psychiatrists. In 1968, she was confined to a mental hospital, in Grand Rapids, Michigan. Then she was committed to the Michigan State Lental Hospital. Presently, in 1973, she is an outpatient at this Michigan medical facility. In 1966, the witness brought an action for the custody of the children, not for divorce, in Supreme Court, Kings County, New York City. In 1966, he had four children, age 6 years to 3 months. On September 27, 1966, there was a Supreme Court order (#11202) signed, giving him custody of the children. The witness did have work experience with the New York State Crime Commission and he knew many people whom his wife did. However, she knew them to the extent that she could ask favors of various members of the Mafia. His wife on a number of occasions threatened the witness with grievous bodily harm. The witness was very much concerned with the security of the children and always had them watched by a detective. Then there came a time when the witness rented an apartment in Brooklyn and he took his children to that apartment. He then had his parents (Marie Miller and the claimant William Dana Miller) move in to this apartment in Brooklyn with the children and the witness. In 1966, after the divorce decree and the granting of custody to the witness, the witness returned to Staten Island. There was needed at the time a very strong person, in the family, who would always be able to stay with the children. This was to thwart any evil actions on the part of the psychiatrically impaired mother (the witness's wife) to either abscond with the children or cause them harm.

Further: The witness remarried in 1972. He still considers his first wife as a threat. For a long period of time there was always a policeman

at the door of their home. In 1969 there was a 9-month labor strike at the Manhattan Direct Mail Company. There were many occasions when individuals would come to the office and say that they wanted to see the company records. These books were always made available. There came a point in time, after about 4 or 5 such occasions, when the claimant protested that "investigations" were going too far. He then called the Social Security District Office and it disclaimed any knowledge of such repeated examinations. The witness believes that some of the people that came in and demanded to see two, three and four year-old records, were actually union representatives who wished to harm the company. That is the reason why the last time, when people, ostensibly from the Social Security Administration, came in, the witness put his foot down and said that no more books would be shown to anybody. He and the Manhattan Direct Mail Company have always cooperated with the Social Security Administration in the many requested inspections of the company books.

(Examination by Judge): He and his parents took the children to Brooklyn in May 1966. They lived in Brooklyn for about six months, until October 1966. Then he and the children, and the parents, moved to Staten Island in October 1966. He has always had maids in his employ who "lived-in," to take care of the children. His second wife had been a detective.

Further: He always needed somebody in the family to stay with the children. The reason was that if some people came with papers which purported to demand the release or the custody of the children, an employee would not be able to cope with that situation. However, if there were some member of the family present at such a time then the rights and physical integrity of the children would always be protected. That's why he had his mother and step-father move in with him and then move with him, to Staten Island in October 1966.

Further: Between May 1966 and December 1969, the claimant invariably was on the company premises. He does not recall how many times, but it may have been three to four times a month. Occasionally, the claimant would come in and stay from 15 minutes to one hour. He may have gone to the bank on some occasions. He would not do the operation of any machine and did no work on the Manhattan Direct Mail Company premises between May 1966 and December 1969.

rurther: The claimant had been injured on many, many occasions in his operation of the various machines on the business premises. The witness was always afraid of a recurrence. The claimant was hampered by a very marked hearing deficit and for other reasons his agility at the machines was markedly hampered. On each of the many occasions that the claimant was injured at a machine, he never went for medical treatment; he always tried to stem the bleeding, put bandages on by himself. But it appeared, after a long period of chronic mishaps, that the claimant's presence on the business premises was decidedly more of a disadvantage than an asset to the operation of the business. That's why the claimant's presence

was not needed and was not given on the business premiser after May 1966; and, for domestic reasons, his physical presence at the household where his children were, proved to be a decided and necessary asset.

Further: William Dana Miller was given one check for \$10,000 in December 1968. The business is run "pretty much by our accountant." There came a time in December of 1968 when the decision was made that a check for \$10,000 would be given to William Dana Miller. (The witness does not remember what the witness received, but it probably was something considerably less.) "If, the way the stock is split, he owned, everybody, they owned most of the business, I owned practically nothing of it, like 2%, maybe 5%. If dividends were declared, to spend off the profits, naturally I would wind up much lower than I am. So rather than declare dividends as the means of splitting up the profits, I think that this means of putting out bonuses or whatever you want to call them, in this way, I would come up with a little higher percentage than I would if dividends were declared." The distribution was \$10,000 to William Dana Miller, two or three thousand dollars to his wife (the witness's mother) Frances Marie Miller, and \$5,000 to the witness (the claimant's step-son). The decision that was made for this kind of distribution was solely the accountant's. "The amount of money that Mr. Miller had invested in the company is, to my way of thinking, closer to \$25,000 or \$50,000, than having to do with two, four, five, six or twelve." The money that the claimant invested was not set up as a loan. So it was decided to give Dana Miller part of the profits for 1968. And this was at the same time that the witness got a share and his mother got a share. The individual who decided the particular shares and the amount was the accountant auditor. "The accountant kind of figures up a rough figure, and we go along with it. We all know what's going In December 1969, William Dana Miller got \$5,000. The witness does not remember what he, the witness, received in December 1969 but it probably was a couple of bonuses. He does not remember what his mother, Marie Miller, received. The decision for the  $\phi$ 5,000 again was made by the auditor accountant. "The significance of December is that by that time he has lumped together all his mistakes." The auditor accountant again was the one who made the decision. "Well, I would say that he would propose it, and we would affirm it." "Question: Mr. Miller did not say, this is what I want you to do, and figure out a way to do it? Answer: No. I can clearly say that. Question: He never said that? Answer: No."

Counsel for claimant submitted a report by the appellant's physician, (Exhibit 66) a specialist in Otolaryngology:

MMr. Wi'liam Miller was examined by me on June 26, 1973. A comprehensive otologic history and physical examination was performed. Audiological evaluation included puretone air and bone conduction, speech audiometry and hearing aid evaluation. .....Using the guides of the AAOO and AMA, Mr. Miller's hearing

loss is calculated as an 80% hearing loss in the right ear and a 100% hearing loss in the left ear. There is an 83% binaural hearing loss. A review of Mr. Miller's records from hearing aid purchases shows that this degree of hearing loss has definitely purchases shows that this degree of hearing loss has definitely purchases shows that this degree of hearing loss has definitely purchases shows that this degree of hearing loss has definitely purchased been present from at least 1968, as document by an audiogram done that Beltone Hearing Aid of Staten Island. In all probability, it has been present from 1965 when the first hearing aid was purchased. It is my opinion that Mr. Miller has a severe handicap due to his hearing loss. The prolonged use of Quinine over no many years significantly contributed to this hearing loss. He can understand only shouted or amplified speech. His use of the telephone is severely restricted. There are limitations to the amount of hearing aid amplification that can be used because of poor tolerance of amplified sound."

The Social Security Act provides that deductions shall be made from old-age insurance benefit payments if the claimant is charged with "excess earnings". Section 203(b) of the Act, 42 U.S.C. Section 403(b)

"Excess earnings" for a taxable year are earnings for such year in excess of the product of \$140 multiplied by the number of months in such year, except that half of the first \$1200 excess shall not be included. 42 U.S.C. Section 403(f)(3).

An individual's earnings for a taxable year are the sum of his wages for services rendered in such year and his net earnings from self-employment, minus any net loss from self-employment. 42  $U_{\bullet}S_{\bullet}C_{\bullet}$ . Section  $403(f)(5)_{\bullet}$ .

Wages are defined as any remuneration paid for employment. 42 U.S.C. Section 409.

The burden of proof is upon the party asserting the affirmative of an issue, using the latter term in the larger sense and as including any negative proposition which such party might have to show. If he alleges a fact that is denied, he must establish it. Having alleged the truth of a matter in issue, he must prove it.

For purposes of imposing deductions under Section 203(b), the Act creates a presumption that an individual in fact rendered services for wages in excess of the allowable maximum. Section 203(f)(4) of the Act, 42 U-S-C. Section 403(f)(4).

The claimant thus had the burden of proving that he did not render such services in such months for more than the said amount.

One pertinent excerpt from the Social Security Act, as amended, reads as follows:

#### 42 U.S.C.A. 409

"For the purposes of this title, the term 'wages' means remuneration.... paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash; except that, in the case of remuneration paid after 1950, such term shall not include -

(a) .... (i) Any payment (other than vacation or sick pay) made to an employee after the month in which he attains age 65..., if he did not work for the employer in the period for which such payment is made...."

The pertinent excerpt from the Code of Federal Regulations, reads as follows:

#### 20 CFR 404.1027

"Exclusions from wages. -

(a) Annual wage limitation. - (1) The term 'wages' does not include that part of the remuneration paid by an employer to an employee within any calendar year... (b).... (c)....

(n) Payments to employees for nonwork periods. - (1) The term "wages" does not include any payment (other than vacation or sick pay) made by an employer to an employee for a period throughout which the employment relationship exists between the employer and the employee, but in which the employer does no work (other than being subject to call for the performance of work) for the employer, if such payments is made after the calendar month in which: (i) The employee attains age 65, if the employee is a man..."

The pertinent provision of the Federal Insurance Contributions Act is as follows:

#### F.I.C.A. Section 31.3121(a)(9) - 1

"(a) The term 'wages' does not include any payment (other than vaction or sick pay) made by an employer to an employee for a period throughout which the employment relationship exists between the employer and the employee, but in which the employee does no

work (other than being subject to call for the performance of work) for the employer, if such payment is made after the calendar month in which - (1) The employee attains age 65, if the employee is a man...."

Benefit payments after retirement age to an individual who continues in an employer-employee relationship are not counted as wages, provided: (a) the employee did not actually work for the employer during the period for which the payment is made, and (b) the pay is other than vacation or sick pay. The Federal Insurance Contributions Act and Title II of the Social Security Act contain identical exclusions.

Substance is condidered rather than form. Inquiry is made into the bona fides of a business arrangement, particularly if the arrangement is among members of the same family. Neuman v. Celebrezze 310 Fed. 2nd 780; Skalet v. Finch 431 Fed. 2nd 452.

The Manhattan Direct Mail Corporation filed tax returns which showed the following:

1969

Compensation to corporate officers:

1966

William Miller - \$4,125 Marie Miller - \$11,600 William Evers - \$14,123	William Miller - \$6,680 Marie Miller - \$14,135 William Evers - \$16,745	
1967	1970	
William Miller - \$1,500 Marie Miller - \$16,600 William Evers - \$19,200	William Miller - \$6,680 Marie Miller - \$15,345 William Evers - \$16,490	
1968	1971	
William Miller - \$11,680 Marie Miller - \$24,170 William Evers - \$17,465	William Miller - \$6,680 Marie Miller - \$16,000. William Evers - (not given)	

The claimant's earnings record, as certified by the Bureau of Data Processing and Accounts, on June 5, 1973 reflects these most recent entries

	1969	1970	1971	1972
January 1 - March 31 :	\$ 420.	\$ 420.	\$ 5420.	\$ 280.
April 1 - June 30 :	423.	420.	420.	560.
July 1 - September 30 :	420.	420.	560.	420.
October 1 - December 31:	5416.	420.	280.	3

The Social Security Administration contends (1) that this claimant is not entitled to the payment of Old-Age Insurance Benefits for any month commencing with the month of January 1965 down through the month of December 1971; (2) that the (Old-Age Insurance) benefits that actually had been paid to him, should be recovered; (3) that the assured herein is liable for this said sum of \$8267.60 in the aggregate.

Findings of fact and conclusions of law are as follows:

- An employer-employee relationship existed between the company and the claimant from January 1965 through December 1971.
- The claimant worked and received earnings for the activities performed by him for the Manhattan Direct Mail Company, in excess of the statutory amount, during all months of the years 1966 and 1967.
- The applicant herein markedly reduced the amount of work and the time expended in the furtherance of the business enterprise in 1967.
- 4. At no time in and subsequent to January 1968 did the appellant herein perform any of the requisite skilled managerial or technical work in the said business enterprise.
- 5. The appellant herein did no work for this company during the inclusive months of January 1968 through December 1971, even though the employer-employee relationship was maintained.
- 6. Subsequent to December 1967, the claimant herein was (idiomatically speaking) a "phantom" employee or a "no show" employee.
- 7. The effective date of the claimant's retirement was January 1, 1968.
- Imposition of work deductions are effective for all months January 1965 through December 1967.
- 9. Recovery of benefit sums paid to this claimant for the months of January 1965 through December 1967 (a) would not be "against equity and good conscience" and (b) would "not defeat the purpose of Title II" of the Social Security Act, as amended.

wherefore, it is my decision, after consideration of the oral testimony herein, and on the entire record, that the assured herein (a) was entitled to Old-Age Insurance Benefits under the Social Security Act, as amended, commencing with the month of January 1965; (b) was first eligible to receive payments of cash benefits under such entitlement commencing with the month of January 1968; (c) is liable for the repayment of benefit monies paid to him for the inclusive months January 1965 through December 1967. The Social Security Administration to do the necessary to abide the event.

Date February 28, 1974

Lawrence P. Ashley Administrative Law Judge

# DEPARTMENT OF CHEAT. THE EDUCATION, AND WELL ARCH SOCIAL SECURITY ADMINISTRATION, BUREAU OF HEARINGS AND APPEALS

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#### TRANSCRIPT

in the case of

Claim for

William Dana Miller

Old-Age Insurance Benefi.s

(Cleimant)

091-10-1320

(Rege Earner) (Leave blank if same as above.)

(Social Security Number)

Hearing Held

at

26 Federal Plaza, New York, New York

on

June 20, 1973 and August 8, 1973

APPEARANCES: William Dana Miller, Claimant
Marie Buers Miller, Witness
Harry Hughes, Witness
William L. Evers, Of Counsel and Witness
Charles Marks, Esq. -Attorney for Claimant

Lawrence P. Ashley

Dorothy Esner

Admin. Law Judge

Hearing Assistant

Form HA 508

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(1st Session)

In the case of Account Number William Dana Miller 091-10-1320

Opening Statement by Attorney . . . . . . Commencing p. 10
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(2nd Session)

In the case of William Dana Miller

Account Number

091-10-1320

Testimony of Marie Evers Miller	Commencing p. 1
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Testimony of William L. Evers	Commencing p. 5
Timal Argument by Attorney	Commencing 0. 8

S.A

Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare, on June 20, 1973, at 26 Federal Plaza, New York City, in the case of William Dana Miller, claimant and wage carner, Social Security Account Humber 091-10-1320. The claimant, William Dana Miller, appeared in person, and was represented by Charles Marks, Eeq., of New York City.)

(The hearing commenced at 2:14 p.m. June 20, 1973).

ADMINISTRATIVE LAW JUDGE: The bearing is now convered in the case of William Dana Willer, Social Security Number 091-10-1326. Refere we get started this afternoon, I would like to make a few preliminary remarks. The authority to hear this case has been delegated to me by the Secretary of the Dapartment of Realth, Education, and Welfare, in Washington, and I am here today to hear this case. That is, I will take testimony that the claimant will give, the testimony of any witness that his attorney may care to bring in, and I will receive into evidence all papers and documents which have evidentiary value. Now, it appears that on March 31, 1966 this claimant filed an Application for Old-Age Insuxance Benefits. A Certificate of Social Insurance Award was drawn on June 16. 1966. This provided for a monthly benefit commencing with the date of March 1965. Some years subsequent to that, particularly in 1972. and more specifically on March 15 of that year, the Social Security Administration notified the claimant that they were stopping benefits effective with the month of March 1972, because it was alleged that "You actually-because it was determined that he did not retire at that time when he filed the application. Subsequently, a Request for Reconsideration was filed, and then on July 10, 1972, the

claimant was notified that it was determined on this reconsideration, that not only had be not proven that he had, in fact, and in law, been retired from his business but that the nomice that had been previously paid to him as the Old-Age Insurance checks were an overpayment to him and the demand for the refund of this overpayment was made. There, or September 11, 1972, the claimant and his attorney filed a Request for a hearing. Now, I have no connection with the Eureau that made those determinations. I am going to render a decision in this case. This decision will be my own and will be a completely independent one. No determination made before today is in any way binding or has any controlling effect on the decision that I will make. In other words

MR. MILLER: Yeab.

ADMINISTRATIVE LAW JUDGE: Will you say all right, and not shake your head. Otay, is that all right? Do you understand?

MR. MARKS: I don't think he can hear you. What he is maying is, that they're going to start this determination, this hearing, is starting do novo, from the very beginning.

MR. MILLER: Yes.

MR. MARKS: And anything previouslto this will not be determinative.

Hots going to decide on what he sees in front of him today.

MR. MILLBR: I sec. I sec.

MR. MARKS: OKRY?

ADMINISTRATIVE LAW JUDGE: Is that all right with you?

MR. MILLER: I-mif you'll pardon ma---

ADMINISTRATIVE LAW JUDGE: Do you understand?

MR. MILLER: I--

ADMINISTRATIVE LAW JUDGE: Do you understand, Mr. Miller?

MR. MILLER: That --

ADMINISTRATIVE LAW JUDGE: We're going to start from the beginning.

MR. MILLER: In other words it begins right here and if anything

gone heletofore is--

ADMINISTRATIVE LAW JUDGE: Not binding upon me.

MR. MARKS: That's right.

MR. MILLER: I understand that, yes.

\* \* \*

\* \* \*

ADMINISTRATIVE LAW JUDGE: \* \* \* Counselor, you have a right to a brief opening statement. You have a right to a final argument. Do you wish to make an opening statement?

MAR. MARKS: Yes, I do. The claimant, William Dana Miller, is a young man of 73 years of age. He is by training and professtion, a Geologist, specializing in what is known as Field Geology, and spending most of his adult life in the search for deposits for petroleum in all the wilder parts of the world, with concentration,

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particularly in Venezuela and Colombia. He graduated from the University of Chicago, in 1919. By 1929 he was on his way to Columbia as an employee of the Gulf Oil Corporation, and thereafter except for sojourns to places such as Now Zealand, Australia; Russia, and a number of other countries and parts of this country, he spent most of his time in Venezuela and Colombia. I might sav that in the course of his explorations, which it was necessary for him to conduct, he was the first white man, or one of the first, to discover what is known as Angel's Falls, the highest falls in the world, in Venezuela. He landed on that falls in an airplane in a search for gold, with a co-pilot. They found no gold. They were eventually brought out of the jungle. He also discovered, prior to World War II, a submarine base apparently built by the Germens in preparation for World War II. He came across it accidentally in the jungle. And unfortunately, in the course of his searches for oil he contracted malaria, which is one of the most diseases in the world. I believe a hundred million people in the world suffer from malaria. Now, the damp of choice in treating malaria is quining, and various dérivatives of quining. The reason I mentiomed that is that it has an important bearing upon his ultimate retirement many years later. As your homor may know, it is comparatively rare that malaria is ever cured. It becomes dormant and what usually happens is that there are recurrent attacks from time to time, and the only way of treating it is with quinine or a derivative of quining. Unfortunately, the administration of quinine is often attended with a condition called

syncho-synchronism, spelled synchronism, which has a synchrone including temporary or permanent deafness. This is a well known condition and it frequently happens. Mow, after being hospitalizati with an early attack of malaria, in the early 1920's, he consisted at his work as a field geologist. He first worked for Gulf Odl Corporation and then for other companies, one in Australia and New Zealand, and then he worked for Esperanza Oil Corporation, waich is a subsidiary of Amarado Petroleum Corporation. By 1957 he was a Vice-President and General Manager of Experanga Petroleum Corporation. His work by that time was comparatively limited and he retired in 1957, in that capacity, from Esperanza Petroleum Corporation. However, in 1950, and thereafter, up to May of 1966, he was associated with and employed by Manhattan Direct Mail, Incorporated, in New York City. And he built up that business in the early years, as I will show, until 1966. In 1966, he found that he was still suffering recurrent attacks of malaria and bo, to use his words, lived on quinine. He took large doses of qunine, whenever be needed it. He bought out the drugstore, I understand, and he found in 1966, that his hearing deteriorated. He the asked upon a career of purchasing hearing aids. He bought about 5 or 6 of them, or more. Spent appreximately six thousand dollars for hearing aids and none of the hearing aids was satisfactory. Because he couldn't bandle a telephone conversation, and because he couldn't handle ordinary conversations with the hearing aids that he then had, and because it was dangerous to operate equipment in Manhattan Direct Mail

because of his lack of hearing, he decided that he would have to a tire. That decision was also based on another reason, his step-so: William L. Buers, who had been married to his first wife, found the there were matrimonial problems which he encountered. His first wife became a psychotic. In 19t6, she was divorced from him and unlike the usual case, the children of William Evers, was awarded to William Evers, and not to his wife. That is the custody. However,

ADMINISTRATIVE LAW JUDGE: I don't mean to interrupt. Do you say the claimant was married to a woman, and then this woman--MR. MARKS: No. No. The claimant's step-son was married. ADMINISTRATIVE LAW JUDGE: Yes.

MR. MARKS: During the claimant's employment with Manhattan Direct Mail, he married one, Marie Evers, who became Marie Evers Miller, his present wife. The step-son, William L. Evers, is the some of Marie Evers, by a former marriage. ADMINISTRATIVE LAW JUDGE: Okay.

MR. MARKS: And that step-son was married and he experienced matrimonal difficulties-

ADMINISTRATIVE LAW JUDGE: Wbo?

MR. MARKS: The step-son. In 1966, he obtained a divorce--ADMINISTRATIVE LAW JUDGE: Mr. Evers?

MR. MARKS: William L. Bvers, the step-son-

ADMINISTRATIVE LAW JUDGE: Secured a divorce.

MR. MARKS: Secured a divorce against his than wife. ADMINISTRATIVE LAW JUDGE: Okay.

MR. Middle The custody of his children, there were 4 infant children was awarded to William L. Evers, in 1966. But fearing that his wife who was, to say the loast, emotionally unstable--

ALBEINISTRATIVE LAW JUDGE: Whose wife?

MR. MARKS: William L. Evers' wifer-would deprive William L. Svore of the custody of the children, William L. Evers felt it incumbent upon him to furnish some adult who could be present with the children in a protective role. William L. Evers then lived on Todt Hill, in Staten Island, and owned the house. He arranged to transfer that house to the claimant, and the mother of William L. Evers, Marie Evers, who had become the wife of the claimant. And they moved from Riverside Drive to Staten Island, where they now resided. And as I understand it, William L. Evers, continued to reside in that house with the claimant and his wife for a certain length of time, and later moved to another dwelling.

ADMINISTRATIVE LAW JUDGE: I don't want to preclude you counselst, but could you wind up your opening statement?

MR. MARKS: Yes, I will. I am saying that this was another reason why the claimant found it convenient and desirable for him to retire in 1755. There was the impairment of his boaring and the need for someone to exercise a protective function with regards to these children I am now referring to. Now, from that time on, no substantial services wase rendered by the claimant in any business whatsoever. He had previously retired from Esperanze Oil Corporation, and he had retired in May or June of 1966, from the Manhattan Direct Mail. That,

essentially is the situation here.

ACMINISTRATIVE LAW JUDGE: OKAY.

NR. MARKS: I'd like to add one other point. It is true that various payments were made to the claimant during the period from 1966 to 1971. We contend that since he did not render any services and could not, because of his hearing disability that those payments were made in recognition of the services which he had rendered years earlier, in the early 1950's, when he often worked without any salary and often found it desirable and necessary to finance its daily operations, which he did. So that, in effect, these payments were distributions of capital in recognition of what he had done many years before for Manhattan Direct Mail.

ADMINISTRATIVE LAW JUDGE: All right, you are going to have to get him to say that.

MR. MARKS: I shall try.

ADMINISTRATIVE LAW JUDGE: ORay.

MR. MARKS: There is one other matter and that is that yesterday

Mr. ---yesterday, the claimant was examined by a certified audiologist

who has reduced the results of his examination to writing, and the

results are being forwarded to a physician who will evaluate them

and will indicate objective evidence of Mr. Miller's hearing disability.

And I should like to have additional time in which to furnish that

report to the tribunal.

ADMINISTRATIVE LAW JUDGE: Yeah. Can you get it in in the next two weeks?

MR. MARKS: Yes, I expect to.

ADMINISTRATIVE LAW JUDGE: Okay. You have until July 15th.

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MR. MARKS: All right.

AUMINISTRATIVE LAW JUEGE: July 16th is on a Monday.

MR. MARKS: I'll tru to get it in even earlier than that.

ADMINISTRATIVE LAW JUEGE: Chay.

MR. MASKS: I should like to examine Mr. Miller at this time.

The claimant, William Dama Miller, having been first duly sworn, testified as follows:

## EXAMINATION OF CLAIMANT BY ATTORNEY:

- Q Where do you reside at the present time?
- A 661 Tods Hill Road, Staten Island.
- Q And with whom do you reside there?
- A Mrs. Miller, my wife.
- Q And is she also known as Marie Evers Miller?
- A Right.
- Q And what relation, if any, is William L. Evers to you and to her?
  - A Stemson.
  - Q then were you born?
  - A January 5, 1900.
  - Q And are there any children of your marriage with Mrs. Miller?
  - A No.
  - Q What is your profession?
  - A Geologist.

- Q And have you had formal training in geology?
- A University of Chicago.
- Q Did you graduate from the University of Chicago?
- A Yes.
- Q When?
- A 1919.
- Q And did you receive a degree upon graduation, and if so, what was the degree.
  - A Bachelor of Science.
  - Q In any particular area? Subject matter?
  - A Well, that was-oh, it was on the record, Bachelor of Science.
  - Q Mell, did you major in particular subject.
  - A Ch, geology.
- Q All right. Now thereafter, in about 1920, did you find employment as a geologist?
  - A Yes.
  - Q For whom did you mark and where?
  - A Gulf Oil Corporation.
  - Q And where did you work?
- A Ab, for a few months in the United States. Later, Columbia, South America.
- Q And what was the nature of your duties as a geologist for the Gulf Oil Corporation?
- A Exploratory geologist, as exploratory petroleum geologist, I presume you would say.

Q And can you elaborate on that a little bit to explain what an exploratory geologist does, or what you did in that capacity for Gulf Oil Corporation?

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A Well, we surveyed the country with instruments, looked at the rocks, put them down on maps, and them at the end of the job attempted to evaluate whether they were oil bearing possibilities in the textitory, over which I had gone.

Q All right. I take it than, that this required outdoor expeditions on behalf of your employer over considerable periods of time,
is that correct?

- A And covering considerable areas, yes.
- Q All right. Now, did there come a time in the course of your work when you became ill?
  - A Yes, I contacted my first malaria early in the 1920's.
  - Q And were you hospitalized?
- A Yes, I want to Corazon. I was in the hospital in Corazon about 1922 or '21 or '22.
- Q And as a result of that illness were you---did you find it mecessary to take any medication?

A About all we know in those days was quinine. And so quinine-- and I had a pretty bad case of malaria so I took a lot of quinine.

Q Since that initial attack of malaria have you had any other attacks of malaria?

A Well, I suppose you would call it a recurrence, now and then.

In which case you-well, you take more quining that's all.

Q How frequently do you have these attacks of makaria?

A Well, it works out with me in this respect that I'm very sensitive to any type of cold and fever and whatnot on-so therefore why I take plenty of Bromo-Quinine today because being semaitive of cold and temperature, fever in other words, now how much of it is an exchinary cold and how much of it dates from the old quinine of the old releases it's just pretty hard to say, but I still take plenty of quinine.

Q But you didn't answer my question. My question was how often do you have an attack of malaria or symptoms which you-

A Oh, I

Q Excuse me-or symptoms which you find desirable to treat with quinine?

- A Oh, I would say once every two or three months, perhaps.
- Q All right.
- A More or less.
- Q Now, for how long a period of time did you work for Gulf Oil Company?
  - A In 1920 to '24. 1920 to '24, yes.
  - Q All right. Now, thereafter did you find another employment?

  - Q What was the nature of the employment and for whom did you wo
  - A I went to New Zealand and Australia in-early in 1925, stayed there during 1926 and worked for a local company known as Australia Propriatory Limited, also for oil-oil investigation.
    - Q You did the same type of work that you had been doing for Gul

#### Oil Corporation?

- A Correct.
- Q Is that correct? All right. Now, after 1926 did you perform any further work as a geologist?
- A Yes. I was employed by a subsidiary of the Eldorado Petroleum Corporation, in 1927.
  - Q And what did you do for them?
- A Well, primarily as a geologist again but also in charge of the engineering and other aspects of a development of several hundred thousand bectares of land in Venezuela, South America.
- Q For the tribunal's convenience, I should like to point out that one bectare as it is called, is equal to 2.471 acres, so that the witness is referring to several or twice several handred thousand acres of land in Venezuela, which was potentially oil bearing. Now, for how long a period of time did you continue working with Esperanza Oil Corporation?
  - A Let's see, until 1957.
- Q All right. In 1957 what position did you occupy with Esperanza Oil Corporation.
  - A I was Vice-President and General Manager, in Venezuela.
  - Q And can you give us briefly some idea of your duties?
- A Well, in this, roughly a million acres that we had down there in oil concessions I was responsible. I was not only chief geologist but I was also sort of chief engineer and we had to do a survey of the whole country. I was responsible for that. We had to pay taxes on it. I was responsible for the payment of taxes, and in other negotiations

with the government in the-what should I call it-the development of this land and so it was more or less as such an executive capacity as it was a geological capacity, I would say.

- Q All right. Now, I believed you said you worked until 1957-
- A Yes.
- Q --with Esperanza Oil Corporation. What, if anything, happened with regard to your employment in 1957?

A Well, if I understand your question I had been then almost 30 years with the company and I became connected with this Manhattan Direct Mail--

Q Let me change my question a mement. Did you continue with Esperanza-working #othEsperanza Petroleum Corporation after 19577

A Only being called in occasionally as a consultant for which I received no money. Something might go wrong in Venezuella and having boun down there for so many years, they'd say what do you know about this, or can you give us some information on that? But for none the worse did I ever except any salary.

- Q Ent did you formally retire in 1957?
- A If I understand it, yes because I began to get amounty from some life immarance company.
- Q then was the last time you went on a trip to Venezuela for Esperanza Petroleum Corporation?
  - A I'd say about '56 or '57. I forget just now.
- Q Now, you indicated that you became associated with Manhattan Direct Mail, Inc., is that correct?

A Would you mind repeating that please?

- Q You testified that you became associated with Manhattan Direct Mail Inc., --
  - A That's correct.
- Q Is that correct? Do you recall in what year you became associated with it?
  - A 1950.
- Q And at this time I should offer in evidence the minute book of Merchattan Direct Mail which includes among other things its Certificate of Incorporation, describing its business as including the conduct of a general direct mail business and to carry on the business of advertising and printing, either as principal or agent, and also includes a receipt for the filing of a Certificate of Incorporation, in the office of the Secretary of State, of the state of New York, dated January 30, 1950.

ADMINISTRATIVE LAW JUDGE: Instead of taking the whole book-and when the hearing is over we'll make a photostat.

MR. MARKS: (Unintelligible)

ACMINISTRATIVE LAW JUNGE: I don't need the entire minute book you just quoted from the Certificate of Incorporation. MR. MARKS: All right.

ADMINISTRATIVE LAW JUDGE: Just the pages that you referred to. We'll make a photostat of it.

MR. MARKS: All right.

ADMINISTRATIVE LAW JUDGE: You need all the purposes set out-MR. MARKS: No, of course not.

AUMINISTRATIVE Law JUDGE: -- in the papers.

MR. MARKS: The said exhibit also indicates that on February 16, 1950, the claimant, W. Dana Miller was duly elected as the treasurer of Manhattan Direct Mail, Inc., and that he became a director thereof, together with 4 other directors and that he subscribed to 30 shares of its stock for the sum of \$3,000 and that co-subscribers thereto included William L. Evers, who subscribed to 5 shares for \$5000 and Maria Evers who also subscribed to 30 shares for \$3,000.

# RE-EXAMINATION OF CLAIMANT BY ATTORNEY

- Q Now in 1950 were you married to Marie Evers?
- A No.
- Q When did you marry her?
- A August, 1953.
- Q And will you explain to us the nature of the business of Manbattan Direct Mail, Inc.?
- Well, its a printing business and also a business in which le are sent to the Post Office, bulk amounts, but it's really much more than a simple letter shop type proposition. We do quite a bit of--a variety of printing type of work. I'm no expect on Manhattan Direct Mail as a -- except as I have beer -- we do photographic work for exampl I know nothing about the photographic machine.
  - Q Is that your answer? Your full answer?
  - A Yes.
  - Q All right.
  - A We have I judge around 25, 26 different type of machines in office. We have-of those 25 or 26 we have a half a dozen what we

call multilith of various sizes. Some of them print ordinary sizes like this, some of them will print half the size of this table. In addition to that, we have folding machines in which we fold these—this printed material. We have inserting machines which will insert these letters in an envelope, likewise we have this photographic equipment that you can step up and down photographs. Likewise, we do a lot of mailing on this—on these various angles. I would judge that at times—for example we mail for American Airlines something like 40,000 items every 2 weeks. We do a lot of work for Netropolitan Museum of Art, 40 or 50 thousand also every mother or so. But this mailing is addition, of course, in which we make the deliveries to the post office, in addition to a lot of the printing we do for these people. We do work for American Broadcasting Company for example.

ADMINISTRATIVE LAW JUDGE: Nr. Miller. hat's fine, but your attorney wants to know what is it your company actually produces for American Airlines, for the Metropolitan Museum of Art. Is it a catalog, is it a program, is it a souvenir sheet--

A Chiefly letters-chiefly letters, but we also produce catalogs.

MR. MARKS: All right. All right.

A -- I don't know whather--

Q Where is Manhattan-syou referred to the office of Manhattan Direct Mail and you referred to it as baving machinery in the office, where is this located?

- A 122 Duane Street, New York City.
- Q And at that address, what premises are occupied. Does it occupy a particular floor?
- A Yes, we have a certain floor, around 6,500 square feet, I believe.
  - Q What floor is it?
  - A I believe it's the 3rd floor.
  - Q Now, how wide is it approximately?
  - A I'd say it would be 65 x 125, something like that.
- Q All right. Now, if Mr. Goldstein, assuming Mr. Goldstein were to visit the front of this office would there be anything to obstruct his view of the xear of the office so that he could see a person at the rear, such as yourself?
- A Wall, we have 2 or 3 rather large machines. If I happen to be around a large machine and directly behind it, why he just coming in the door--he perhaps may not--
- Q Let me ask you this. Is this area to which you're been referring partitioned in any way?
  - A No, none whatsoever.
  - Q What about the hallway -.
- A Wait a minute, one little corner we have the photographic equipment but that does not obstruct the view for the rest of the place.
- All right. Now, is there a location in this area where there is a desk for the performance of executive work and clerical work?
  - A Yes, oh yes.

- Q And did you usually occupy that particular area?
- A At one time, yes.
- Q Well, when you were working with Manhattan Direct Mail, did you usually sit at that desk?
  - A Yes.
- Q All right. Now, if somebody came into the front or the rear of Manhattan Direct Mail offices, the ones you've been describing, would there be anything to obstruct the view of that person so that he could not see you at that desk?
  - A I don't think so.
  - Q Well, is there anything in the way?
- A Well, we had files. Now sometimes those files were, say this high, now it could be that we got behind one of those files-coming in the door-
  - Q Where is the elevator located with respect of this desk?
- A At one of the corners of the building. My desk was at another corner, in which there was a file. Sometimes the file was 5 or 6 feet--
  - Q Wait a minute. How far from the elevator was your desk?
  - A About 20 feet I would say.
- Q All right. And between your deak and the elevator-could you see the elevator from your deak?
  - A Yes.
- Q All right. And there would be nothing to prevent somebody coming in through that elevator from seeing you at your deak, is that correct?

- A Correct, yes.
- Q So that if Mr. Goldstein came to the front of the office, this area you've been referring to and you were present he could see you, is that correct?
  - A Correct.
  - Q By the way, have you ever been known as Bill Miller?
  - A No.
  - Q What are you usually called?
- A Dana. My name is William Dana Miller, everybody knows me all over the United States as Dana Miller.
- Q And at the Matropolitan Museum of Art have they ever referred to you as Bill Miller?
  - A Not that I know of.
- Q Have you customarily dealt with them on behalf of Mahhattan Direct Mail?
  - A Never.
  - Q Never?
  - A Never.
- Q All right. Now, in the year 1950 and 1951, was a party named Brown associated with Manhattan Direct Mail?
  - A Yes.
  - Q And what was his function in the corporation?
  - A General Manager.
- Q And did there come a time when his role as gameral manager terminated?

A About a year and a half later I believe. Sometime around the winter of 51, I believe.

MR. MARKS: If your honor pleases, I respectfully wish to point out a telegram from Western Union addressed to a N.H. Welson, which recites: "At request of Dana Killer, I tender my resignation as general manager of Manhattan Direct Mail to take effect immediately", and it bears the name Thomas W. Brown. The telegram being dated December 11, 1951. And that is part of the corporate minute book which I have offered in evidence.

- Q After Mr. Brown tendered his resignation, was it accepted?
- A Yes.
- Q And were new officers elected or appointed?

A I believe so, but my memory is a little indistinct on that right now--exactly what happened.

MR. MARKS: If your honor please, the corporate minute book also contains minutes of a stockholder's meeting on January 22, 1952 reciting that the following stockholders were present, Marie Evers, W. Dana Miller, William L. Evers, and N. H. Nelson, by proxy. It further recites that the following directors were duly elected to serve for the ensuing year and until the election and qualification of their successors, W. Dana Miller, Marie Evers, N.H. Nelson, William L. Evers, and Ann Schop.

Q Now, when you became associated with Manhattan Direct Mail were you paid any salary at all in the year 1950?

- A Best to my recollection, no.
- Q Did there ever come a time when you were paid a salary?

A I think it must have been about 1957, after I retired from Esparenza Petroleum Corporation.

Q And from 1950 to 1957 what work did you do at Manhattan Birect Mail?

A Well, I was sort of jack of all trades I gress around there. I did a certain amount of delivery work, a certain amount of folding machine work, some of the simplier machines, but I think chiefly the work I did was to ride herd on the books.

Q I should like to point out that the minutes of the corporation also dated January 22, 1952 also include the following statement:

"The following officers were unanimously and duly elected, W. Dana Miller, president and treasurer, Marie Evers, vice-president and general manager, William L. Evers, secretary, N.H. Nelson, chairman of the board.

ADMINISTRATIVE LAW JUDGE: Who is the third one?

NR. MARKS: Third one? William L. Evers, secretary.

ADMINISTRATIVE LAW JUDGE: Okay.

Q Now, in your capacity as president and treasurer, did you perform any functions other than what you've mentioned a moment ago? Did you perform any executive work of any kind?

A Wall-in-the rest of the directors I think we discussed matters of business.

- Q What type of matters?
- A Buying new machinery, where we were going to get the money.
- Q Did you pass on the hiring and firing of the employees of the

- A I do not believe so, to the best of my recollection.
- Q Did you have anything to do with the rates of pay of those employees?

A Very little. I would say that they say, let's hire some person and we offered them \$80 a track or \$90 a week, and I would say okay, but that would be either Mrs. Byers or Mr. Byers who would make the suggestion. I would just merely okay it. I had no idea about how much anyone should get.

- Q Did you ever participate in any decisions relating to increases in salaries?
  - A Probably.
  - Q Do you recall specifically along those lines?
- A I don't recall now but they'd say well let's raise the salary 5%, and I'd say okay or something like that to Mrs. Evers or Mr. Evers.
  - Q Did you have anything to do with any cost analysis?
- A Well, I pretty well went through the books all right. Now, what do you mean by cost analysis-which-
- Q Well, an analysis of the costs of various operations or the production of any final product made by-
  - A Up to a certain extinct, yes.
  - Q And what specifically did you do?
  - A So many hours on the job.
  - Q I dom't understand you. Can you elaborate on that?
  - A Well, I did check-I tried to check on what a job was costing

job, so much per hour, and we turned out so many pieces of material per house, and so forth and so on. I did a certain amount of that work.

- Q And did that also involve time checks of any kind. Time studies?
- A Up to a certain point, yes.
- Q What did you do in connection with time studies?

A Here would be an employee A who spent 2 hours to do, say a bundred pieces of material, here's a person who could do 150, so we counter-balance that into the extinct that we'd tell this person to-better speed up here or balance the average on the whole job. In other words, 250 for 2 people would equal 125 pieces. Now, whether that was of any advantage to us in our ultimate, I can't say right now.

Q Approximately how many employees were in Manhattan Direct Mail from 1950 to 1957 at any one time?

A Oh, it varied. I judge from 12 to 20 or something like that.

Namy an average up to 16 or 17, or something like that.

Q And did that figure continue thereafter at substantially that level?

- A As far as I know, yes.
- Q Up to the present time?
- A Up to the present time.
- Q All right. Now you testified that in 1953 you married Marie Evers?
- A Right.
- Q Is that right? And did there come a time when Mr. Nelson died --
- A I believe that would be 19-in the summer of 1952. I'm not sure of that.

- Q Let me put it this way. Did there come a time when the stock previously held by Mr. Nelson was offered to the corporation?
  - A Yes, by his estate.
  - Q By his estate?
  - A Yes.
  - Q . And was that offer accepted?
  - A Yes.
  - All right. I would like to direct the tribunal's attention to the-that portion of the corporate minute book containing the minutes of March 1, 1955 which recites among other things the following directors were duly and unanimously elected, Marie Evers, W. Dana Miller, William L. Bvers. The Chairman then reported on the negotiations with the estate of Nels H. Nelson for 55 shares of the common capital stock of the corporation and stated that the stock had been acquired as treasury stock of the corporation at \$50 per share. Upon motion duly made, seconded and unanimously carried the action of the officers in purchasing the stock of Nels H. Welson at \$50 per share of treasury stock was hereby approved and ratified. Now, would it be correct to say that as of March 1, 1955 the sole stockholders of Manhattan Direct Mail, Inc., were yourself, your wife, and William L. Evers?
    - A Correct.
  - Q Is that correct? And the sole directors thereof were also yourself, your wife, and William L. Evers.
    - A Correct.
    - Q And is true with regard to all other officers of the

corporation, that is, the Vice-President, President, and Treasurer and Secretary, were all allocated among the 3 of you, is that correct?

A Right.

#DMINISTRATIVE LAW JUDGE: While you are at it counselor, in what way?

MR. MARKS: Well, all right.

ADMINISTRATIVE LAW JUDGE: Maybe your claimant knows it?

NR. MARKS: I think I have a specific reference. In the minutes contained in the corporate minute book, dated January 22, 1952, I believe I referred to this before, the following—and I am quoting—the following officers were unanimously and duly elected, W. Dana Miller, President and Treasurer, Marie Evers, Vice-President and General Manager, William L. Evers, Secretary, N.H. Nelson, Chairman of the Board. Now, obviously Nelson died—

- A Some months later --
- Q -- Who if anybody became chairman of the board?
- A No one.
- Q The office was left unfilled?
- A Right.
- Q Now, during the period from 1950 to 1957, can you tell us how many hours per week you worked at Manhattan Direct Mail, Inc?

A Well, it varied. Some weeks I would work 25, 30 or 40. Sometimes maybe over the including weekends it might run up to 60, 50 or 60 hours per week. But it varied. It would be hard for me to strike an average, in other words.

- Q And did there ever come a time when you were called upon to provide capital for the operation of Manhattan Direct Mail?
  - A Well, in the earlier days especially in the early '50's, yes.
- Q Can you give us some idea of the amount of capital which you furnished?

A Well, it's hard for me to total up but a number of times I met the payroll, and a number of times I put up the money for the different machines we may have purchased along the time.

- Q What kind of machines?
- A I judge the machines that run into \$500,000 maybe, \$1,200 apiece.
- Q And what was the approximate amount of the payroll you referred to?
- A I would say around \$1,500 a week or something like that in those days. That 11 be my guess.
- Q All right. And can you give us some idea of the number of weeks when you advanced money to cover the payroll for Manhattan Direct Mail?

  ADMINISTRATIVE LAW JUDGE: Between when and when.
  - Q And during what period?
- A Well, in those early '50's, why we'd run a little shy of money and it may have been for several consecutive weeks at a time I met the payroll.

ADMINISTRATIVE LAW JUDGE: All right.

MR. MARKS: Now, after you retired from Esperanza Petroleum, di-

Inc., that you have testified to up to now?

A In and out I judge, yes. But it was--well, from 1957 on for 2 or 3 years I guess maybe I was active--what I might term active with Manhattan Direct Mail.

Q And did you still continue putting in the same number of hours a week approximately?

A Approximately I would say yes.

Q Were you required to put in any particular number of hours a week?

A No.

Q As a matter of fact, having married Marie Evers and since all of the officers and directors were in effect in the same family, you had what amounted to a family business?

A That is correct.

Q Where all of the stock was held by the members of the family, is that correct?

A Correct.

Q Now, in May of 1966, just before you claimed you retired, what was the nature of your work at that time in Manhattan Direct Mail, Inc?

A Well, I more or less was delivery bey and ran a machine or two now and then.

Q What kind of machine?

A Folding machine. We had a job with American Tract Society, with several of the American Rible Society, and we'd run a good many thousands every couple of weeks or so. That was my chief job, as delivery boy.

A Well, I don't know any more thanjust conformed to what I had always been doing.

Q Did you attend a director's meeting in March of 1966?

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- A I believe so, yes.
- Q All right. I'd dike to direct the tribunal's attention to the minutes of the annual meeting of director's of Manhattan Direct Mail, Inc. which form a part of the corporate minute book and which refer to a metting held on March 1, 1966 in New York City, at which were present W. Dana Miller, Marie E. Miller, and William L. Bvers. The minutes go on to provide on motion duly made and unmanimously adappedd the following officers were elected, President and Treasurer, W. Dana Miller, Vice-President and General Manager, Marie B. Miller, Secretary William L. Buers. Now, were you authorized to sign any checks prior to your retirement, in the month prior to your retirement?

A I think so. Yes, I believe so.

ADMINISTRATIVE LAW JUDGE: He didn't say when he retired?

- A I think I signed checks-
- Q Just a minute, let me rephrase that. In May of 1966, as well as prior to that time, were you authorized to sign checks on behalf of Manhattan Direct Mail, Inc?
  - A To the best of my recollection, yes. Now I can be mistaken.
- Q Now, in or about May of 1966, did you suffer an impairment of your hearing ability?

A Well, I don't know if it was much workse but it got to be that—just like here today—on the telephone I've got to have a special telephone which we have out in my home so I had to eliminate myself from telephone calls and ordinary conversations, and also to a certain extent, on the machinery—on the few machines that I was able to run there. Just like if you're driving an automobile and you be—gin to hear a bearing knock you'd better slow up. Well, we have similar sounds on a machine, that if you—something develops on it—that isn't running right, why if your hearing is impaired you'd better stop that machine—you will stop that machine instantly.

Q Now, you testified that you operated from time to time a folding machine, is that a noisy machine?

- A Pardon?
- Q Is that -- is the folding machine a noisy machine
- A Not too much. No, I don't--
- Q Well, let me ask you this. Do you guide yourself when you operate that machine, do you guide yourself in any way by the noise of the machine?

A Oh, well the smoothness of running, yes. But if you should pick up a ta, ta, ta, something like that, you'd slam on--you'd stop that machine immediately.

Q All right. Now, suppose you can't hear that, what then? What if anything can happen if you don't hear it?

- A That machine could fly into a dozen pieces.
- Q Would that involve any danger to you?

- A It would involve danger, maybe not to me, but it would involve the smashing of the machine.
- Q Well, if these pieces flew off, would they involve a possible danger to people in the area?
  - A It could, yes.
- Q And one of those people would be the operator of the machine, is that correct?
  - A That is correct.
- Q Now, I belive you also testified that you had a telephone attachment at home to aid you in hearing, was there such an attachment in the office?
  - A No.
- Q Well, were you able to handle telephone conversations in the office?
  - A Not beginning with 1965, 166.
- Q And what about ordinary conversations in the office, could you handle them?
  - A Difficult.
- Q All right. Now, I show you a check dated 11/27/, 1965, payable to Buchannan Hearing Aid Company, in the amount of \$715, can you identify that. Is that your signature on the check?
  - A Yes.
  - Q And what was that for, if you recail?
  - A One of the first of the series of hearing aids that I have had.
  - Q Was that hearing aid satisfactory?

A No.

Q I show you a check--

ADMINISTRATIVE LAW JUDGE: Did you get your money back?

A I'm sorry.

ADMINISTRATIVE LAW JUDGE: Did you get your money back?

MR. MARKS: Did you get your money back?

A No, because I had used it for sometime and finally just discarded it and went around and figured I could get a better one.

MR. MARKS: If your honor please, I have a number of these checks and bills, I'd like to offer them enmass so as not to encumber the proceedings unnecessarily.

ADMINISTRATIVE LAW JUDGE: All right. We'll make a photostat at the close of the hearing of all of them and we'll mark it in ab that time.

Q Can you identify a check dated 12/5/66, payable to Empire State Hearing Aid Bureau, in the amount of \$758, is that your signature on the check?

- A Yes.
- Q And what was that for?
- A Hearing aid number two at that time.
- Q I show you an invoice bearing #F1328, dated August 1, 1967, reciting sold to Mr. W.D. Miller, 122 Duane Street, New York, New York, 10007, and ask you whether or not you can tell us what that invoice was for?

A Another hearing aid.

- Q Was that satisfactory?
- A That's number three.

ADMINISTRATIVE LAW JUDGE: How much was that?

MR. MARKS: For \$599. And I show you this check also dated August 1, 1967, payable to the same party whose name appears on the invoice, Empire State Hearing Aid Bureau, Inc. in the amount of \$599. I ask you whether or not that is your signature?

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- A Yes, that is my signature. Yes.
- Q And what was that for?
- A For that.
- Q By that, you're referring to the invoice that I just exhibited to you?
  - A I think that's correct.
- Q I show you what purports to be a duplicate of a purchase agreement indicating the seller's name as Bell Tone Hearing Service, at
  609 Manor Road, Staten Island, New York, dated 9/5/68 and stapled to
  it is a statement referring to various battery purchases from October 1,
  1968 through the bulk of the year 1969, and I ask you whether or not
  you can identify those documents?
  - A Yes, varied purchases.
  - Q For what?
  - A That's this group.
  - Q By this group, to what are you referring?
  - A These are batteries for the--

- Q By these, you're referring to a number of small cylindrical batteries held in your hand?
  - A That's correct.
  - Q And what are the batteries used for?
  - A Well, we put them in the machine you see--
  - Q A hearing aid?
  - A That's correct.
  - Q What is the purchase agreement refer to?
- A I had just a -- oh, the purchasing agreement over here, all thisthis is still some more hearing aids, here 860.
- Q By 860, you're referring to \$860, is that right for the purchase of a hearing aid?
- A Two hearing aids. One-by this time I was beginning to get hearing aids for both ears.
  - Q Were they satisfactory?
  - A Well, only partially so.
  - Q Now, what Mo you mean by partially so?
  - A Well, I could hear but not too well.
- Q Well, I'll go into that in a moment. I show you a check dated September 6, 1968, payable to Bell Tone Hearing Service in the amount of \$860, signed W.D. Miller, is that your signature?
  - A Yes.
- Q And I presume that was in payment of the sum specified in the purchase agreement?

ADMINISTRATIVE LAW JUDGE: May I have the date and the amount, counselor?

MR. MARKS: The date, September 6, 1968, the amount \$860.

ADMINISTRATIVE LAW JUDGE: Okay.

Q I show you a purchase agreement dated 3/30/73 indicating as the seller's name E.N. Tabin, T A B I N, also at 609 Manor Road, and in the space where the purchaser is to sign appear the words W.D. Miller, is that your signature there?

- A Right. That's the last one I bought.
- Q And by the last one, you're referring to a hearing aid?
- A Yes.
- Q All right. Now, have you bought any other hearing aids?
- A Earlier I bought some cheaper ones.
- Q How much earlier?
- A A couple of years earlier.
- Q That would be in 1971?

A That would be along in through there but they were just highly unsatisfactory so I went into where you have the special to fit your ear. That's how they run into five or six hundred dollars a throw.

Q Now, you indicated that the hearing aids were either unsatisfactory or partially unsatisfactory.

- A Well, I--
- Q Now, will you explain what you mean by that?
- A Well, partially unsatisfactory—it's no use for me to go into an audience or to go to a movie because I won't—in other words listen to a speaker, I can't do that. I have difficulty for example also in a radio. I don't always get what they're talking about.

That's why-but if I get close enough to it I can hear, but if I'm-if a number of people are around are talking, it's just lost to me.

So therefore I don't have a normal ordinary type of hearing,
certainly not like I used to have in my early days. That's why I
say partially so.

Q Now, did this condition which you experienced in or about 1955 or 1966, did it continue substantially in the same way from that day to the present time?

A I would say roughly, yes.

Q All right. Now, yesterday were you examined by a certified Audiologist who conducted hearing tests on both your ears, is that correct?

A Yes.

Q And did he indicate to you his opinion as thethe extent of the impairment of your hearing?

A I asked him that question specifically, and he said it was between--if I were exactly, 15--15 and 20%, which means 80, 82% impairment. That's it.

Q Did he also describe your hearing loss as a profound hearing loss? Do you recall?

A He said it might be rectified.

Q No, no, no, just answer my question. Did he describe your hearing loss as a profound hearing loss?

A Yes.

Q All right. And as I have indicated the result of those ex-

aminations are being forwarded to a physician who will evaluate them and I shall submit the report as soon as I receive it and hopefully I'll be able to receive it by--approximately a week or 10 days from now.

ADMINISTRATIVE LAW JUDGE: All right, I already gave you July 16.

Q Now, in 1965 and 1966, I believe you testified that you had taken large quantities of quinine?

A Right.

Q As you had done over the years prior to that time. In that connection I'm going to ask the tribunal to take judicial notice of the term Cinchonism, which is spelled C I N C H O N I S M, --

ADMINISTRATIVE LAW JUDGE: Do you want to say that slowly?

Q cinchonism. Punk and Wagnell Standard College
Dictionary, at page 245, defines cimobena as any of various Peruvian
trees and shrubs—genus cinchona of the matter family, now widely
cultivated in India and Jawa as a source of quinine and related
alkaloids. And it goes on to define cinchonism as an abnormal
condition caused by everdoses of cinchona characterized by giddiness,
deafness and temporary loss of sight. In addition, Cramps & Carr
in a work entitled "The Pharmalogical Principles of Medical Practice,
at page 103, recites in connection with its discussion of the effects
of quinine, action on the ear, large therapeutic doses of quinine in
the normal individual and as little as 5 grins in the hypersensitive
person frequently produce a ringing in the ears. The tentitous
aurium, that's a u r i u m, is related to the blood quinine Concentrations. When the drug leaves the circulation the symptom

disappears. When treating malaria, this symptom of medication is frequently distressing. Prolonged treatment has been known to produce deafness.

ADMINISTRATIVE LAW JUDGE: Counselor, would you put a clip on that paper. I would like to get a photestat of the title page and the page that you have just quoted from.

MP. NARKS: I do have excerpts which I've been quoting from if you'd prefer that.

ADMINISTRATIVE LAW JUDGE: Yes, that would do fine. Do you have the title page and the edition?

MR. MARKS: Yes.

AMMINISTRATIVE LAW JUNGE: Okay.

MR. MARKS: And-well, have you got everything that I—and
finally the Bible of Pharmacology, known as the work by Geodman &
Gillman, The Pharmalogical Basis of Therapeutics, 2nd Edition, pages
1197 to 1198 recite: When quimine is repeatedly given in full doses,
a typical group of symptoms occur to which the term cinchonism has
been applied. Then it goes on to say, in its mildest form it consists
in ringing in the ears, headache, mausea, and slightly disturbed
vision. But when medication is continued or after large single doses
symptoms also involve the gastrointestinal tract, the nervous incardiavascular systems, and the skin. And at page 1198 it goes on
to say, hearing and vision, and that is in italics, are particularly
disturbed. Functional impairment of the 8th nerve results in
tentitis decreased audiotory acuity and vertige. I ask the tribunal

to take judical notice of the property of quinine which can result in cinchonism on the theory that this is akin to a law of science or a well known property of a chemical substance within the knowledge of the general and medical community.

Q Now, getting back to the year 1966, do you recall your stepson having any matrimonial difficulties with his wife?

A Yes.

Q And can you tell us the nature -- in a brief way, can you tell us the nature of those difficulties?

A She spent a great deal of time away from the house-she began to spend a great deal of time away from the home.

- Q Did she suffer any mental difficulty?
- A I judge so, yes.
- Q Well, as far as you know, was she ever medically determined to be in any way mentally disturbed?
  - A I don't quite understand your --
  - Q Mas she ever confined to a mental institution?
  - A Not at that moment.
- Q Bid there ever come a time when she was confined to a manutal institution?
  - A I believe so.
  - Q When was that, if you recall?
- A I think some months later, or some years later, or something like that.
  - Q Do you know the name of the institution?

- A I do not recall.
- Q In any event, were those matrimonal troubles, did they ever result in a termination of the marriage between her and your stepson?
  - A Yes, they were divorced.
  - Q All right. In what year if you recall?
- A I believe about '68, something like that. I maybe mistaken on thatone.
- Q Wall, more acturately, it was '66. I will emlist the testimony of yours in 1966. And was an award of custody of their children made?
  - A To the father.
  - 11 How many children were there?
  - A Four daughters.
  - Q And bow old were they?
  - A Oh, they were between 2 and 7 and 8, I believe.
  - Q Im 19667
  - A More or lass, yes.
- Q All right. Now, with regard to that award of custody, did you ever have any discussion with your stepson as to whether or not his divorced wife would accept that award or would attempt to interfere with that custody?
  - A I would say yes, that my stepson was worried.
  - Q Mom was this?
  - A About that period.
  - Q And what was he worried about?
  - A That she might try to run off with the children.

Q All right. Did he ever explain why he was worried about that?

A She was gone a good deal. He was working in town. We just had not they just had maids there, she could come in and grab the children and

Q But did he ever tell you why he felt that she might be inclined to take the children?

A I don't know that except she was irratic at times that she could attempt anything. I guess that's the best way I could put it, and we were all workied about it.

- Q Up to the time you retired, where were you living?
- A Riverside Drive.
- Q And you were living there with your wife, Marie Evers Miller?
- A Correct.

ADMINISTRATIVE LAW JUDGE: Excuse me counselor. We haven't established either that he did retire or when he retired.

- Q All right. Up to May of 1966, where were you living?
- A I believe Riverside Drive.
- Q All right, can you give us an address?
- A 36 Riverside.
- Q All right. Did there come a time when you moved from that address?
  - A Yes.
  - Q When did you move?
  - A Late in '66.
  - Q And whore did you move to?

- A 661 Todt Hill Road.
- Q Is that the place where you presently reside?
- A Correct.
- Q All right. When you moved there, who occupied that house when you moved in?
  - A My stepson.
  - Q Asid your wife--
  - A And his wife and the children.
- Q All right. Now, after May of 1966, did you spend much time in that residence?
- A A fair amount, yes. I gradually spent more and more time over there, as a result of the deterioration of the condition between my stepson and his wife.
- Q And while you were there did you engage in the supervision of his children?
  - A Well, as far as a man could, yes.
  - Q Did they attend any kind of school?
  - A Yes.
- Q I believe you mentioned the youngest was 2 years old at the time, in 1966? Did the youngest go off to any nursery echool of any kind?
- A Yes, they--I don't believe it was 2 years of age, but at 3 or 4 why she attended the kindegartem school, private kindegartem sc'ool, yes.
  - Q When you moved to the Todt Hill resident in 1966, how many

children of your stepson remained at home while you were there?

- A All of them.
- Q All of them. And did yo supervise them during that time?
- A Yes, the best a man could.
- Q All right. And did you continue to do so thereafter?
- A Yes.
- Q Ower what period of time?
- A Over 2 or 3 years, several years I would say.
- Q All right. Did there come a time when your stepson remarried?
- A Yes.
- Q When was that, if you recall?
- A I believe it would be about 1971. In the spring of '71.
- Q All right. And did there come a time when he moved out of the Todt Hill residence?
  - A Yes.
  - Q When was that?
  - A Shortly thereafter. In the spring of '71.
  - Q And did he take the children with him?
  - A Yes.
  - Q And where does he reside now?
  - A In Staten Island, but a different place.
  - Q All right.
  - A Jewatt Avenue, I believe.
- Q Naw, when you moved to-- I withdraw that. At ox about the time you moved to the Todt Hill residence, did your stepson transfer

ownership of that residence to you?

- A Yes.
- Q And did he also transfer ownership to your wife?
  - A Both of us I believe.
  - Q And do you presently own that residence.
  - A That is correct.
- Q All right. Now, I show you this paper, bearing in the upper right hand corner the date 1966, and I ask you whether or not you can identify it for us?
  - A That's my Social Security number, yes. Is that what-
  - Q No, the paper itself. This whole paper that you're holding in your hand. What is that paper?
  - A I don't know. I maybe--gosh, I never saw this. It must belong to the company record I guess.
  - Q All right. Let me put it this way. After May of 1966 was there any change--I withdraw that--up to and including May of 1966, do you recall what your salary was at Manhattan Direct Mail, Inc?
  - A I believe it was soon after we moved over to Todt Hill Road it was reduced.
  - Q No, no, no. Up to and including--in the month of May 1966, what was your salary per month?
    - A It was around \$600 a month, something like that.
    - Q All right. Now, after May was there any change in your salary?
    - A I think it was reduced to around \$135 or \$140, if I recall.

- Q All right. Now, after May of 1966 did you take any part in the business of Manhattan Direct Mail?
  - A Very little.
  - Q What did that very little consist of?
- A Well, I would say that it was mostly consultation with the family after they got home.
  - Q What did you consult about?
- A Should we raise wages, or lower wages, or should we buy-
- Q Let me put it this way. Did you-how many hours a week after May of 1966, and for the balance of 1966, can you give us some idea of the amount of time per week that you went into Manhattan Direct Mail, Inc., if at all?
- A I doubt if I spent in the business itself more than just a few hours in the whole month.
  - Q All right. And what about 1967?
- ADMINISTRATIVE LAW JUDGE: Excuse me. Counselor, could you ask him to define a few hours?
  - Q What do you much by a few hours, how many in numbers?
  - A 10 or 12.
  - Q 10 or 12 hours a month-
  - A Yes.
  - Q For 1966?
  - A Yes.
  - Q That is after May?
  - A Yes.

- Ω And what about during the year 1967?
- A Not any more.
- Q And knat about for the years 1968 through 1971?
- A Americantely the same.
- Mil right. Now, when you went in there, did you make any cost
- A Will, I checked the company records. In other words, I looked
  - wies Yes.
  - A . In other words, check the finances of the company.
- 2 But apart from checking the finances, did you participate in the operation of the company?
  - A Mo.
  - Q Did you operate any equipment?
  - A None. Not from the middle of 1966, on.
  - Q All right. Did you operate folding machine at all?
- A No. I'd say now, for 6 or 7 years, I haven't even touched a machine, except maybe a calculating machine.
  - Q And for how long did you touch the calculating machine?
  - A Not more than just a hour or two, at any one time.
  - Q And during what years?
- A Oh, maybe once a month or two I'd drop in, or once in two months.
  - Q Now, during the years 1966 through 1971, you continued to

receive various payments from Manhattan Direct Mail.

- .. A That's correct.
  - Q If you didn't perform any services, what were the payments for?
- A Well, I don't know. Maybe it was for some of the past work I had did. Cextainly I wasn't doing any work that was worth any sizable sum of money for the company during these years, so therefore, it must have been for some past work that I had. That was more or loss the theory, as best as I can figure.

Q For example, in 1966, you received \$525 over and above the exampt amount under the Secial Security law, that is, from Japuary through May, you were receiving approximately \$600 to \$650 a month and thereafter your salary was reduced. The exampt amount for that year was \$125 a month, if you add that up you'll find that you were paid a total of \$4,125 for the year 1966, which is approximately \$525 above the exampt amount, in other words, above what you'd be entitled to under the Social Security law. Now, what was that \$525 be for?

- A I certainly do not know. At the moment, I don't recall.
- Q Well, you testified a moment ago that it might be for the early years when you didn't receive a salary.
  - A I said it could have boun because it was juggled back and forther
  - Q In 19-
- A Not juggled, I'd like to withdraw that word, but it was adjusted back and forth on what had been done or not done amongst the-the agreement amongst all the participants, the centers of the company.

- Q In 1968, you received \$11,680-
- A Yes.
- Q --Which was \$10,000 in excess of \$140 a month which was the except amount in 1966. Now, do you know what that additional \$10,000 was for?
- A I would say that it was probably for some of those rendered services back in the older days there. Now that would be my best guess on the thing.
- Q Did you over have a discussion about this with any of the other officers and directors of Manhattan Direct Mail?
- A Undoubtedly, I had with Mrs. Miller, yes. Perhaps with Mr. Evers here.
  - Q Do you recall the substance of those discussions?
  - A They were agreeable.
  - Q Agreeable to what?
  - A To this amount that I received.
  - Q Did they indicate for what reason, if you recall?
- A Well, they may have made a general-but I den't recall exactly; but they may have-well, we owe it to you that's all for what you've done in the past.
  - Q Did you discuss that at any time with your accountant?
- A I don't recall that I have. Now, I'm not sure of that but I do not recall that I have. Perhaps I did.
- Q De you recall Mr. Goldstein, your accountant, referring to Section 102 of the Internal Revenue Code, as pesing a difficulty in

connection with undistributed prefits of the corporation?

- A Yes, I did that.
- 'Q And do you recall him saying amything about the desirability of distributing those profits?
  - A Yes, he suggested that we distribute some of them. Yes.
- Q Did he say anything about those profits being distributed in recognition of your earlier work, in the early 1950's for Manhattan Direct Mail?
- A It may have been something said on that. I would say yes on that.
- Q All right. Now, in 1969 and 1971, you received \$6,680 for each of those years, which was, for each of those years \$5,000 above the exempt amount. Do you know whether or not that \$5,000 was paid on a basis similar to just what you've just testified to?
  - A That's my recollection, yes.
- Income Tax Returns for Manhattan Direct Mail, Imc., for the years 1966 through 1971, and I ask you whether or not they fairly and truly represent accurate copies of the returns which were filed with the Federal Government for those years? Yes or no, if you can tell me.

AUMINISTRATIVE LAW JULIGE: What years were those?

NR. MARKS: 1966 through 1971.

Q Now, I direct your astention to Schedule E on page 2 of each of those returns, the column entitled, the numeral III "Time Davoted.

To Business, and then in Column 1 appears in the first instance, your name, William Dana Miller, and your address. In the 3rd column it says full. Now--

A I don't know what he means by full. Certainly I never spent

Q Just let me ask you the question. Now this notation appears
in the same or similar schedules on each of the income tax returns I
just exhibited to you, can you tell me whather or not that designation
is correct?

A I would say no.

Q All right.

A Issorrectly to the extent, I was full time as president, but I spent no time at all. But insofar as the census delivered there, I say it is not correct.

Q When you say full time as president, what do you mean by that.

Do you mean-did you work as president for a specific number of hours?

A No, just nominal. I just got a nominal job.

Q In other words, nominally you occupied the status of president of Manhattan Direct Mail, Inc., is that correct? Is that what you're telling me?

A Well, I'm president, but I don't do anything for it.

Q All right. I would like to offer these returns for the years

ADMINISTRATIVE LAW JUDGE: Well, we have it for 1968, '69, '70 and '71, already in evidence.

MR. MARKS: Than I will offer '66 and '67.

ADMINISTRATIVE LAW JUDGE: Okay. We'll make photostate and the photostats will go in.

MR. MARKS: In fact, I can give you these copies.

ADMINISTRATIVE LAW JUDGE: All right, if you-okay. That will be-give that the appropriate exhibit number because we have other exhibits
prior to that today.

MR. MARKS: If you don't have the individual income tax return for any of the years '66 through '71, I should like to have an epport-unity to submit those.

ADMINISTRATIVE LAW JUDGE: Wall, we have the individual returns for 1966, '67, '68, '69, '70.

MR. MARKS: Then I should like to sub-it the individual income tax return for William D. and Marie E. Miller, for the year 1971.

Will you identify this please? Is that a fair and true copy of the income tax return filed on behalf of yourself and your wife, for the year 1971, with the United States Government?

A Yes.

Q All right. I would like to offer that one in evidence.

ADMINISTRATIVE LAW JUDGE: All right, it's accepted and we will put it down with the appropriate exhibit number at a later time.

MR. MARKS: Do you know whether or not this individual income tax return, for the year 1971, or any of the individual income tax returns for the years 1966 through 1970 makes any distinction with regard to when your wages were earned or when these payments were earned?

ë

- A No, I don't think any of them do.
- Q All right. And did you discuss this with your accountant at any time, as to whether or not it was proper to indicate deferred compensation in the way that it has been set forth in the tax returns I have referred to? Did you discuss this?
- A I don't recall that I had, but I wouldn't say yes, or I wouldn't be sure of no.
  - Q All right. Incidentally, did you prepare this return?
  - A No.
  - Q Bid you prepare the returns for 1960 through 1970?
  - A I prepared none of the returns.
  - Q Whe prepared them?
  - A Mr. Goldstein, our accountant.
  - Q And what's his first name?
  - A Gerald.
  - Q All right. I have no further questions of this witness.

ARMINISTRATIVE LAW JUDGE: All right. As you can tell counselor, the hour is late, it is now ll minutes after 5. I have some questions of the witness, but I don't want to do it under pressure of time.

MR. MARKS: I understand.

APPLINISTRATIVE LAW JRDGE: I'm muxe you want to do something with your evening. I'm sure your associate occursel wants to also. It would be my suggestion that we continue this matter to another day, and at that future date, I will interrogate the claimant and you will have the right to redirect the examination if you care to. Also at that future

date, the other two witnesses will be available.

MR. MARKS: Yes.

ADMINISTRATIVE LAW JUDGE: It would be my suggestion that we start it in sufficient time during the day, so that we can get it done at one sitting.

MR. MARKS: All right. May I say that I anticipate that the remaining testimony will not occupy very much time.

ADMINISTRATIVE LAW JUDGE: Well, would you say another hour or so.

MR. MARKS: An hour, it maybe an hour and a half, if that much.

ADMINISTRATIVE LAW JUDGE: All right. Is the afternoon better
for you?

MR. MARKS: Either way. The only daise that I am busy, I believe, are the 5th of July and the 10th.

ADMINISTRATIVE LAW JUDGE: Well, I don't have any room until August.

MR. MARKS: Oh. All right.

ADMINISTRATIVE LAW JUDGE: Counselor, how about 9:30 A.M. on August 8th.

MR. MARKS: That's fine.

ADMINISTRATIVE LAW JUDGE: All right. This hearing stands adjourned until 9:30 A.M. on August 8, 1973. At that time, we will have the rest of the testimony of the claiment and the testimony of both witnesses. This hearing stands adjourned until August 8, 1973. Thank you gentlemen.

MR. MARKS: I thenk you for your patience. I hope it wasn't too chill. (The hearing closed at 5:19 P.M. June 20, 1973)

(This is the second session of the hearing in the case of William Dana Miller, Account Number 091-10-1320. The first session was held on June 20, 1973. Counsel for the claimant is Charles Marks, Esq. of New York City. Also present at the hearing were: Of Counsel, William Evers

(The hearing commenced at 9:59 a.m. August 8, 1973).

ADMINISTRATIVE LAW JUDGE: This is the case of William D. Miller, Social Security Number 091-10-1320. It should be noted for the record that we started this case on June 20, 1973, and it was continued to August 8, 1973. If I recall correctly, the claimant testified in full, is that correct?

MR. MARKS: Yes.

ADMINISTRATIVE LAW JUDGE: Unless you want to recall him?

MR. MARKS: No, I have no further questions.

ADMINISTRATIVE LAW JUDGE: Okay. I will reserve my right to interrogate him after awhile. Do you have another witness?

MR. MARKS: We have three others.

ADMINISTRATIVE LAW JUDGE: Okay. What is the name of your first--

MR. MARKS: Mrs. Marie Evers Miller.

ADMINISTRATIVE LAW JUDGE: Okay, would you call her?

The witness, MARIE EVERS MILLER, having been first duly sworn, testified as follows:

EXAMINATION BY ADMINISTRATIVE LAW JUDGE:

Q Would you state your full name and address?

A Marie Evers Miller, 661 Todt Hill Road, Staten Island. 'ADMINISTRATIVE LAW JUDGE: All right, counselor, your witness.

EXAMINATION BY COUNGELOR:

- Q And you are the wife of the claimant, William Dana Miller, is that correct?
  - A I am.
  - Q Now, can you tell us your occupation?
- A I'm-well, I don't know what my title is, but I more or less
  I work at a printing, mailing occupation, where we do-where we take
  copy and we take pictures and we do whatever we need to. Print them
  or mail them.
  - Q What is the name of your employer?
  - A Manhattan Direct Mail.
- Q And I believe you are a director and officer of Manhattan Direct Mail?
  - A Yes, I am.
- Q And there has been evidence to the effect that you became a director and officer on February 6, 1950, and continued in that capacity thereafter?
  - A Yes, correct?
- Q Now, am I correct in saying that the office that you hold, is that of the secretary of the corporation?
  - A I think it may be that right now -- I'm--
- Q Or that it was originally secretary and that it was changed later?

A I think that somewhere along the line it was vice-president, and now it's probably secretary again.

Q All right. Now, you referred briefly to the nature of the work that is performed by the company. Can you tell us more fully that nature of the work which is performed by Manhattan Direct Mail, Inc.

A Well, we will take copy and we will set type, composition, whatever is required, or we'll take photographs and we will make them into
half tones or whatever, so we'll take any kind of material that is to
be printed and do with it whatever the specifications call for, and
then after it's printed, we fold it and we mail it, or we pack it and
ship it, or we deliver it.

Q And to whom do you usually mail it or deliver it?

A Well, we maintain lists, customer's lists in some cases and they will tell us which one of their lists they want us to use for this mailing, or they will give us the list and we'll type the list. We follow their specifications to do with the material after we've printed it.

Q So, if I understand you correctly, you are concerned with the printing of a variety of literature at the request of specific customers?

A Right.

Q And having completed that task you concern yourself with the mailing of that material-

A -- that's right.

Q --directly to the customers of the customers who retained your services.

- A Yes, that's right.
- Q Rather than returning it to the initial party--parties who placed the orders, is that correct?
- A It's occasionally they may say this is for our own distribution.

  That's occasionally.
- Q I'm referring to the terminology direct mail. You mail it directly to the customer--
  - A Oh, yes.
  - Q -- of the people who retained you, is that correct?
  - A That's right.
- Q All right. Now, do you recall when Mr. Miller began working with Manhattan Direct Mail? Approximately.
  - A Well, it was when he retured from 120 Broadway.
  - Q Are you referring to 1958? Esperanza bi Copporation?
  - A Yes.
- Q All right. Did he work on a limited basis prior to that time with Manhattan--
  - A Yas, he did.
  - Q When did that work commence? Approximately.
  - A Was it '50?
- Q Around 1950? That would have been at the inception of the corporation, is that correct?
  - A Yes.
- Q Now, after he retired from Manhattan Direct Mail in 1958-excuse me, from Esperanza Gil Corporation, did he continue to work
  with Manhattan Direct Mail?

- A He was there for a few more years, about 1966 maybe.
- . Q All right. And did he work on a full time basis in that period?
  - A Never actually full time. About 40 hours a week.
- Q All right. Will you tell us the nature of his work from the period of 1950--let me try to clarify it. From 1950, when he first began working with Manhattan Direct Mail to 1958, at the time he retired from Esperanza Oil Corporation, for how many hours per week approximately did he work in Manhattan Direct Mail?

A Well, it did vary considerably. It depended on--you know-on what the need was.

- Q Was it more than 40 hours a week?
- A Oh, no.
- Q Was it less than 40 hours?
- A Yes, cor derably. Yes.
- Q Can you give us some idea?
- A Maybe half that.
- Q All right. New, from 1958 after his retirement from Esperanza
  Oil Corporation, up to and including May of 1966, did-can you tell us
  how many hours per week he worked at Manhattan Direct Mail?

A Well, he did--he was there more because by that time he did some tolding and many things more. I would say then he would be there maybe 2, 3 full days a week.

Q Can you tell me approximately how many hours per week, --- approximately?

A Maybe 25, 30 hours a week.

Q All right. Now, after the end of May 1966, for how many hours, if any, per week did he work at Manhattan Direct Mail?

A Well, in '66--in--no, in '66 he didn't. He wasn't at Manhattan after about the middle of '66, he didn't work there.

- Q I'm talking about after the end of May in 1966.
- A Yes. No, he wasn't with us.

A All right. You have testified that the worked on a part time—worked to a certain extent from 1950 to 1958 and thereafter he worked to a greater extent, from 1958 to and including all of May of 1966 at Manhattan Direct Mail?

- A Yes.
- Q Can you tell us briefly the nature of the work which he performed?
- A You mean when he came there more frequently?
- Q Over that period of time.

A All that period. Well, he did-he operated the folding machines and he did certain executive things like sign checks and had something to do with the policies, whether we hired and fired, and helped us with our deliveries.

- Q Did he have anything to do with the supervision of any of the personnel?
  - A Not the supervision, no he actually a dvised, but-
  - Q Advised with respect to what?
- A Advise with the salaries and employment and something, but actually the--if you're talking about production supervision, his business was more handling the folder and deliveries and things like that.

- Q All right. Did he have anything to do with the purchase of equipment?
  - A Ob, yes.
  - Q What did he have to do?
- A Well, he bought it lometimes and again we discussed what we needed.
- Q All right. Did he have anything to do with the selection of additional plant space when needed?
  - A Oh, yes.
  - Q What did he have to do in that respect?
- A Well, we-he would go with us to look for new speace and we'd discuss what we needed and how much it cost, and he made decisions about it.
- Q Would it be fair to say generally, that he was concerned with the making of management decisions--
  - A Yes.
  - Q -- And policy for Manhattan Direct Mail?
  - A Right.
  - Q And that in addition on occasion he operated the folding machine?
  - A That's right, That's right.
- Q All right. Now, in 192 course of his work in making these ranagement decisions with regard to policy and the like, was it necessary for him to carry on conversations over the telephone and with other people?
  - A Oh, yes. Oh, yes.

- Q And do you happen to know whether or not in connection with the folding machine it was necessary for him to hear the operation of the folding machine?
  - A Definitely.
- Q All right. Now, you indicated that he signed checks on behalf of the corporation--
  - A That's right.
  - Q Dp you know how many signatories of its checks were required?
  - A On each check there are two required.
- Q All right. I refer your honor to the minutes of special directors meeting held on February 16, 1950, which are already in eivdence and which indicates the requirements as to the signing of checks. As I recall, those requirements are to the effect that any two of the officers of the corporation are authorized to sign checks, but that the minutes show that there are more than two such officers, so that he was one of any of those two who might be available to sign. Now, you testified at the outset to your residence?
  - A Yes.
- Q Am I correct in saying that you reside with the claimant, William Miller?
  - A That's right.
  - Q All right. Your telephone number at home --
  - A Yes.
- Q -- Is set forth in the telephone directory as an alternative telephone number --
  - A That's right ---

Q --For Manhattan Direct Mail. Will you explain the occasion for that listing?

A Well, we get calls Saturdays, Sunday, Monday, early morning and late at night. People want to make deliveries, so they're asking where their shipment is and things like that.

Q Excuse me, I assume when you say we, you're referring to Manhattan Direct Mail?

A Manhattan Direct Mail, yes. So that we try to make ourselves available because we are a service organization. So that if at odd hours they need to ask about a shipment, or make a delivery, that number is in the book in order to by used.

Q All right. Now, when a call is made to your telephone number, is the call—in what—what is the occasion for the use of that telephone at your home. Who is the party who would be called upon to use the telephone there.

A Well, occasionally a truck will call and say I was supposed to be here and you were closed, which is seldom, or it might be a customer saying can we get a--

Q But who would be the party who would have occasion to answer the telephone and respond to it at your home?

A Ohn, I would be the one.

Q All right. Would there be any point in Mr. Miller responding to the telephone?

A No.

Q Why not?

- A Because he can't hear them. I'm the only one.
- Q Now, at my request did you procure the payroll records for Mr. Miller for the years 1966, 1968, 1969, 1970 and 1971?
  - A I did. Yes.
- Q And I show you these records, and I ask you whether they are the ones that you have referred to?

A Well, these are our records, but where are the dates? Oh, yes these are our records. This is his record.

Q All right. May I have those? I should like to offer these in evidence. And your honor might note that the rear side of the payroll record is also included in each of those, as well as the front side. It's a bit difficult to find the date, but there are references to the dates at various points on each of the papers indicated.

JUDGE: Well, we'll make photostats.

MR. MARKS: I have some copies. They're not good copies. If you care to make better ones, I'm quite agreeable to that.

JUDGE: Well, let's see what our machine can work out. We'll make photostats. This will be marked in as one exhibit, we'll give it the appropriate number, at the appropriate time. We will take the obverse side and the reverse side. Wile we are at this point, the record should note that subsequent to the first hearing, the claimant's attorney submitted certain additional documents for inclusion in the record, and it is appropriate at this time that we give it the appropriate numbers.

MR. MARKS: Very well.

JUDGE: So we will hold up the testimony for a minute or two, so that the record will reflect the appropriate exhibit numbers. The medical report of Dr. Lawrence Mazzarella, of Dix Hills, New York, dated July 3, 1973, is now marked into evidence as exhibit 47; a series of quotes from a number of dictionaries and books on chemistry and pharmacy, submitted by claimant's attorney, is now marked in as exhibit 48; a photostatic copy of two checks, dated November 27, 1965, and Pecember 5, 1966, is now marked into evidence as exhibit 49; a photostatic copy of a bill from the Empire State Hearing Aid Bureau, and a photostat of a check dated, August 1, 1967, is now marked into evidence as exhibit 50; a photostatic copy of a purchase agreement, dated September 5, 1968, with a photostat of a check dated September, 1968, probably before September 10,

MR. MARKS: I think it is dated September 6, isn't it?

JUDGE: Well, lower-yes. Yes, September 6, this is marked in as exhibit 51; a statement from the Bell Tone Hearing Service, addressed to William Dana Miller, undated, this is now marked--it is dated.

Battery purchased in 1968 and '69, this is now marked in as exhibit 52; a photostatic copy of a purchase agreement, dated March 30, 1973, is now marked into evidence as exhibit 53; a copy of a Certificate of Incorporation of Manhattan Direct Mail, this is now marked in as exhibit 54; this has also attached to it the notification from the Department of State, of the State of New York, that the Certificate of Incorporation was filed with the Department of State, and the minutes of the special meeting of the directoss of Manhattan Direct Mail, on

February 16, 1950, and a resolution signed by the secretary, which is not dated, and the minutes of a meeting, dated January 22, 1952-

MR. MARKS: Excuse me, are we skipping one? The telegram tending the resignation of--

JUDGE: No we are not.

MR. MARKS: All right.

JUDGE: The minutes of the meeting dated January 22, 1952, and a photostatic copy of the Western Union telegram dated December 11, 1951, and a resolution signed by the secretary, and the minutes dated January 22, 1952, signed by the secretary, and the minutes dated March 1, 1955, and the minutes dated again March 1, 1955, all, as I say exhibit 54.

MR. MARKS: All of that is 547

Manhattan Direct Mail, Inc., for the year 1966, is now marked in as exhibit 55; for the year 1967 is now marked in as exhibit 56; and a copy of the U.S. Individual Income Tax Return Form '040, for William D and Marie E. Miller, for the year 1971, is now marked in as exhibit 62--just a minute, I withdraw that. The U.S. Individual Income Tax Return for William Dana Miller, is now marked in--for the year 1966, is now marked in as exhibit 57; and the U.S. Individual Income Tax Return for the year 1967 for William D. And Marie E. Miller, is now marked in as exhibit 58; the U.S. Individual Income Tax Return for the year 1968, for William D and Marie E. Miller, is now marked in as exhibit 58; the U.S. Individual Income Tax Return for the year 1968, for William D and Marie E. Miller, is now marked in as exhibit 59; and the U.S. Individual Income Tax Return for the

year 1969, for William D and Marie E. Miller, is now marked in as exhibit 60; and the U.S. Individual Income Tax Return for the year 1970, with the tax payer noted as William D. and Marie E. Miller, is now marked in as exhibit 61; and the U.S. Individual Income Tax Return for the year 1971, for William D. and Marie E. Miller, as taxpayer, is now marked in evidence as exhibit 62. Okay, counselor, you can proceed.

MR. MARKS: All right. Now, I requested you to procure, in addition to the payroll records I just referred to, the payroll record for 1967?

- A You did request it, yes.
- Q Were you able to find it?
- A No.
- Q All right.
- A I was not.
- Q Now, may I have the exhibits which I just offered in evidence?

  JUDGE: What do you call these, counselor?

MR. MARKS: Payroll records.

JUDGE: All right. The payroll records submitted by the attorney is now given the number--is now given the exhibit number 63.

MR. MARKS: Now, will you examine the payroll record for the year 1966, and indicate what the earnings--indicate the payments made to the claimant, William Miller during the month of January through May of 1966?

A Well, in January he had 476.80 I believe it is. In February,

he had 476.80--

- Q Excuse me, may I see that a moment? I'm talking about the gross—the gross payments made.
  - A Oh, yes, down here. Well, for January, February, March--
  - Q Yes, through May.
  - A Oh, through May? April and May--
  - Q Can you tell me the monthly payments indicated?
  - A Oh, the monthly payments. \$650.
  - Q All right. And under what column is that?
  - A Well, it's earnings.
- Q All right. Now, after the month of May what was the monthly payments?
- A \$125 for the next--for June, July, August, September, October, November and December, for the balance of the year \$125.
- Q All right. Now, with respect to the payroll record for the year 1968, will you give us a similar information?
  - A Well, he has \$140 a month for the entire year.
- Q May I see that? Now, at the--next to the date 12/29 which would be 1968, there is a figure of \$10,000, was that payment made?
  - A Yes, it was.
  - Q That was a lump sum payment made at that time?
  - A Yes, it was.
- Q All right. I show you this next paggoll record and ask you-and ask whether you can give us the information as to his monthly
  earnings for the year 1969 and the year 1970?

A It's still \$140--oh, I see. Oh, yes, it's \$140 right straight through.

- Q \$140 for what period?
- A For-
- Q Per month we're talking about.
- A Per month, yes.
- Q For what year?

A For 19-this is January, February--oh, yes, it's got '69. Well, in January it says \$140 a month. Then it's a \$125--

Q All right, whatever it tells you.

A In March of '69--yes, and then in April of 1970 it's \$140 for Mpril, May --

JUDGE: Why don't you answer precisely what your attorney asks?

A It's a little hard for me to--

JUDGE: He wants to know month by month for all of '69, and month by month for all of 1970. Don't say, well the next few months is a certain amount. Say specifically, January 1969 so much, February 1969 so much, March 1969 so much. If you can't find it just tell him you can't find it and he can help you.

A Well, January is \$140--

JUDGE: January of what year?

A 1969. And then \$/25 is \$31, and 2/2/is \$31

MR. MARKS: By 2/2 you mean February 2?

A Yes. And 2/8 is \$31. Oh, I see. And 2/15 is \$31 and 2/22/ is \$31 and then March of 1969 says \$125. Oh, I see now. And then in April there's \$140 in 1970 and --

JUDGE: What happened to April of '69?

A I don't see that on here.

MR. MARKS: Were you able to find any records other than the ones that you gave me showing the payroll for the year 1969?

A No, these are the only sheets I was able to find.

Q All right. Now, will you continue with the next date--the next month that you find on there.

A April, 1970.

Q All right. In April of 1970, what were the--

A \$140, and May was \$140 and June was \$140, and July \$140, August \$140, Septeember \$140, October, November, and December, all \$140.

Q All right. Now, with regard to the months that you've omitted in the year 1969, I believe that is reference on the corporate tax return for that year which I believe is already in evidence. I don't have a copy handy, but I believe that it is in evidence, and I believe it will indicate payments at the rate of \$140 a month, or \$125, I'm not sure right now.

A It says \$140 at the tope of the record here.

Well, that does not indicate the year. In any event I respectfully refer your honor to that corporate tax return which will indicate
a rate of payment during the year 1969, and which will supplement the
exhibit from which the witness has been testifying. Now, I show you
the payroll record for the year 1971, and I ask you whether or not you

can tell us the monthly rates of pay during that year?

- A \$171 indicates \$140 a month.
- Q I beg your pardon?
- A \$140 a month for '71.
- Q Throughout the year?
- A Yes.
- Q May I see that? (Paper handed to attorney). I would like to return this.

JUDGE: Okay.

MR. MARKS: Now, with regard to the ear 1967, I respectfully refer the tribunal to Sechedule E of the U.S. Corporate Tax Return of Manhattan Direct Mail for that year, indicating that the claimant was paid \$140 per month, that that tax return is already in evidence. Commencing with the beginning of June 1966 and thereafter through 1971, did the claimant, William D. Miller, remain as an officer of Manhattan Direct Mail?

- A As an officer, yes.
- Q Yes. Now, you have testified that during that period he performed no services?
  - A No, not after '66.
- Q All right. Now, can you tell us on what basis the payments that you previously testified to were made to him?
  - A You mean after the '66 period?
- Beginning with June of '66 through 1971, what was the occasion for making the payments that you have just testified to?

A Well, they were in a way repaying funds that we had been receiving from him all this period of time. It was more or less a --what do you call it--a re--in a way a repaying money that we had been receiving from him.

Q All right. When was the first time, if you recall when he made such payment to Manhattan Direct Mail?

A Manhattan Direct Mail? Well, it was--let me see. We opened in February, February, March--

Q Of what year?

A It was about '50. It was about April or May that he paid payrolls.

Q Weren't there funds available at that time at the Manhattan Direct Mail?

A No. We didn't start out with enough capital as we found to our sorrow, and we found further that the more successful we got the more money we needed.

Q Well, can you tell us the approximate amount or amounts of the monies which he advanced on behalf of Manhattan Direct Mail for pay-roll purposes, in 1950?

A Well, let me see. We had--I guess it would have been about a thousand dollars a week, because we--

Q And for how many weeks did he do that, if you know?

A It wasn't every week, but it would be very suddenly now and then. It could be at I'd say once a month.

Q And subsequent to 1950, did he ever make similar payments on

behalf of Manhattan Direct Mail?

- A Well yes, he helped us buy the equipment.
- Well, let's talk about the payroll first.
- A Oh, well, we didn't have a payroll before 1950.
- Q No, no, no. After 1950, did he ever make any payments to meet the payroll? From 1950 onwards?
  - A Yes, there were times.
  - Q Well, can you tell us the approximate number of such payments?
  - A In 1951?
  - W Yes.
- A Well not quite as frequently as 1950, but there were times--I should think maybe over the period of 1971, he must have paid oh, maybe not once a month but--maybe once or twice a month he paid the payroll.
- Q All right. And were there any subsequent occasions when he paid the payroll after 1951?
- A Well, he eased of a little bit by that time and it was probably only occasionally when we were out of money.
- Q I take it that those monies were paid from his own personal funds?
  - A Yes, they were.
  - Q All right. And was any record kept of those payments?
  - A I just don't think there was.
- Q What was the bookkeeping practice, if any?during those early years, in 1950 and 1951?
- A Well, it just wasn't too much of a bookkeeping practice because I'm not a bookkeeper, but I did keep the books. I mean I got out the

bills and paid bills when I could. That part of it I did for the first year.

- Q Would you say that the bookkeeping practice was informal?
- A It--very.
- Q All right. Now, were there also occasions when he advanced his own funds for the purchase of equipment?
  - A Yes, there were.
  - Q When did that occur?
- A Let me see--we were still at Warren Street. That would be about-I guess we got through '50 with the equipment we had, but about '51,
  we had to start buying tieing machines, typewriters, and different
  things that we had to buy. Occasionally we had to have additional
  equipment or new because we had started with used equipment.
  - Q Expase me, did you say tieing machine?
  - A A tieing machine, yes. I remember that in particular.
  - Q What does a tieing machine do?
- A It's a machine when you send things to the post office they have to be bundled very neatly. So you put them through a tiging machine before you put them in a bag and that machine cut a man's hand, we had to go get another one.
  - No, just answer my question.
  - A Yes.
- Q All right? Now, can you tell us the approximately cost of that equipment?
  - A Oh, I'd say about \$275, \$300.

- Q I see. All right. Is that the total cost or --
- A That's--that particular folding--tieing machine that I am talking about there was a folder that was--oh, about \$1,500.
  - Q Would he advance the cost of the folder?
  - A Yes.
  - Q When was that purchased?
  - A That was later. That was bout '53 or '54, I'd say.
- Q All right. Now, so as I understand your testimony the payments that you made to him during the period from June 1966 through 1971, both the monthly payments and any lump-sum payments at the end of the year were paid in recognition of the earlier contributions—the financial contributions which he had made to the survival of Manhattan Direct Mail, is that absair statement?
  - A That's right.
  - Q All right.

JUDGE: Counselor, what do you mean by recognition?

MR. MARKS: In remembrance if you will, or gratitude. It was, in affect, deferred compensation or perhaps a distribution of profits which was occasioned by the fact that he had initially advanced these funds. May I ask you this, was he ever repaid to your knowledge?

- A No.
- Q Those loands-
- A Not to my knowledge, no.
- Q Cr those advances? All right, I have no further questions of this witness.

## EXAMINATION OF WITNESS BY ADMINISTRATIVE LAW JUDGE:

- O Do you say that when you gave--when the company gave \$140 a month, or \$125 a month to Mr. Miller, that it was done because he was nice enough to keep the company's head above water during the early tryingyears?
  - A Well, that's what happened.
- Q There was a lot of money involved in starting this company wasn't it?
  - A There--we found out there was. Yes.
  - Q What was the initial cpaitalization? \$50,000?
- A I think we put in \$15,000 apiece. That was 30, 40 15,30, that would be \$60,000. We put in-did we put in \$15,000--
  - Q If you recall. About \$15,000 apiece?
- A Oh, no. I didn't have that much money. I didn't have that much money. I can't remember.
  - MR. MARKS: Can you give us approximately--

JUDGE: Through the years why didn't you take a certain amount out of the profits and refund it to Mr. Miller because of what he advanced?

A I don't think the profits caught up to us by that time. We discovered that the bank wouldn't loan us money on used equipment and more than ever, we discovered that the more successful we got, the more money we needed.

Q But if you're going to give money to Mr. Miller at a certain rate every month, why didn't you just say we're going to give you back what you advanced?

A Well, first I don't think we knew what he had advanced for one thing. And for the other thing I don't believe we had a surplus that we felt we could use for that because even today we're suddenly called on for \$20,000 postage and we have to keep a surplus there for postage or else we've got to go and borrow it back again.

Q So do you say you gave this \$125 a month, or \$140 a month to Mr. Miller in 1968, 1969 and 1970, because he was a decent guy and he helped the company when the company needed him?

A Well, that's what happened. We just had to have money every now and then, and we did try to borrow from the bank any number of times.

- Q All right. So he advanced his own personal money?
- A Right.
- Q Okay. Now you were a corporate officer, you have been a corporate officer for 20 years, right?
  - A Yes.
- Q All right. Can you tell me what the reasoning was to make it \$125 a month, or \$140 a month?

A Well--no, I didn't--I don't know that. I don't know what the reason was. I know that we wanted to attempt to pay him back something and we didn't feel that we could take out any big sums for several years there--

Q Well, why not \$150 a month?

A Well, I don't know if it would have mattered. I guess \$150 would have been as good as \$125.

Q But who made the decision?

1.37

- Q But who made the decision to give him \$140 a month?
- A Well, I suppose it was a combination of how much we could afford to add to our monthly expenses, and it was just apportioned out that way in order to give him back some money and not take more than we could afford to give him.
- Q During 1968, and 1969, and 1970, was Mr. Miller actually physically on the business premises?
  - A Oh, no not to work. He occasionally I guess --
  - Q I asked you was he ever on the business premises?
  - A Not to work. Not to be in the production of Manhattan, no.
- Q Well, when he did show up on the premises, was that an average of once a day?
- A Maybe a hour or two once a week or so to pick me up and take me home, or something like that.
- Q There was a time when he was actually operating the folding machine, right?
  - A Yes, that's right.
  - Q There was a time that he was actually making deliveries?
  - A That's right.
- Q Did there come a time when he stopped making a delivery? Did there come a time when he stopped operating the folding machine?
  - A Oh, yes. That was --
  - Q When was that?
  - A About the middle of '66.

Q How do you remember that?

A That's not too difficult because we had a problem—a family problem beside his hearing had gone very, very rapidly downhill at that time, and it was dangerous to have him back there and then we had another situation arise where he was needed even more than on the folder which was too dangerous for him at that time.

Q What has a family situation got to do with what kind of duties he had on the business premises?

MR. MARKS: Your honor, please I expect to induce evidence along those lines in great details.

Q I see. Okay.

MR. MARKS: May I ask one or two other questions?

JUDGE: Yes, just one second. So, you say something happened in the family life--

- A Right.
- Q -- And his hearing started to go very bad--
- A That's right.
- Q -- In may of 1966, is that right?
- A Right.
- Ω And then you say he stopped doing any work at all on the business premises?
  - A At Manhattan, That's right.
  - Q No deliveries, no folding machine, no answering telephones?
  - A That's correct.

Q Was a decision made in May of 1966 and relayed to him, to the effect that, you stay out of it now?

A Well, he more or less felt that he needed to himself, because by that time he wasn't able to communicate with the people in the plant and that was rather disturbing and not too pleasant for him. And then there were occasions on the folder that he saw himself, that he just wasn't up to it anymore. So it wasn't a difficult decision to make.

Q Well, did all the officer get together and say, okay now you're out?

A Yes. No, we didn't say you you're out. I think he more or less decided himself that he just wasn't capable of serving the company in any way, and of course, the officersall lived together. I mean we're always together so it's not any board of director's meeting, to come to a conclusion like that.

Q Well, did he say to you, if I'm not going to be on the business premises, what am I going to do?

A Well, he already knew what he was going to do. I mean we sort of had a reason for--there were other things that had developed at that time, and he was quite willing not to attempt to operate them, because by that time he was quite aware that he couldn't.

Q Well, did he say that he was going to occupy his time doing something else?

A Well, he just didn't come to the plant anymore and we had no occasion to catechize him. He just knew he couldn't work there anymore.

Q So you say after May of 1966, he only came up there maybe for 1 hour a day?

A Oh, occasionally. Maybe to pick up something or to bring something in, or get me or bring me in or something like that.

- Q He had no set time to go in?
- A No.
- Q And when he did go in he had no set time which to leave?
- A No.
- Q And when he did go in he had no set duty to perform?
- A That's correct.
- Q And nobody ever said--did anybody ever say to him, well we didn't think you were coming, but now that you're here do you want to do this, do you want to do that?

A No, we didn't have occasion. We do it with anybody else but we didn't with him.

Q Why no??

A Well, there just wasn't anything that he could really do for us at that time. There just wasn't any service that--we didn't ask him to drive any place for us, so there wasn't an occasion--

- Q You knew your confidence was shaken?
- A Well, we knew the cause.
- Q What does that mean?
- A The he just doesn't hear. He can hear me but most people he can't hear.
- Q So you say it was his difficulty in communicating with the other employees?

- A That's right.
- Q And his difficulty in knowing when the machine was on and the machine was off?
- A That's true. More than ever we didn't know whether he understood what we were saying and that really caused confusion.
- Q And you say you remember the month and day of May 1966 because something important or significant happened in your family?
  - A Yes, that's correct.
  - Q And that's why the date sticks in your mind, is that right?
  - A That's true, yes.
- Q So it's your testimony that something happened in your family, and your confidence was considerably diminished in his caracity to work and that you told him that he can occupy himself with certain other things all of which involved a particular family problem which arose at that particular time, is that what you said?

A I'm not sure whether I told him or whether he told me. But at least circumstances brought it about in that way.

JUDGE: Okay, counselor.

RE-EXAMINATION OF WITNESS BY COUNSELOR

- Q If I understand you correctly, this is a family business, is it not?
  - A Yes, it is.
- Q And the principals in the business and the principals who were in the business in June of 1966 and through 1971 consisted of whom?
  - A My husband and my son.

- Q And yourself?
- A And myself.
- Q And if I understand you correctly, the policy and decisions in the business were made informally?
  - A Oh, yes.
  - Q As a family matter?
  - A Right.
- Q All right. Now, you--in response to the judge's question, you indicated that he might come in on occasion during the day for as much as an hour--
  - A Yes.
- Q --Or to pick you up for purposes of conveying you to your home, is that correct?
  - A That's correct.
  - Q Did he come in every day during the period--
  - A Oh--
  - Q Let me finish. The period from June 1966 through 1971?
  - A No.
- Q How frequently would you say per month during that period, he would come to the plant?
- A Well, in '66 he might have come once in a month, and later on it was less than that, it might be 3 months before he came in.
  - Q All right. In 1970 how frequently would he come to the plant?
  - A It could have been 2, 3 months before he came in.
  - Q All right. And when he came in how long would he stay?

- A About an hour.
- Q All right. And what about the period--the intervening period

  1967 through '69? What would you say with regard to his visits during
  those years?
- A It's never been more than just an hour or two, maybe once, maybe twice a month. I didn't really keep a record.
  - Q All right. And 19717
  - A The same thing.
- Q All right. Oh yes, on the payroll records, the payments are listed in the column headed by the word "earnings"--
  - A That's true.
- Q --Are you testifying by that that he earned that money during the periods indicated in those payroll records, that is, specifically during the period from June 1966 through '71, is that why you put it under earnings?
  - A Well, that's the way the form is made out.
  - Q But did he do any work?
  - A No, it was not payment for work. I mean he didn't earn it as--
- Q Is there any particular reason why you didn't correct the term "earnings" in the payroll record?
  - A No, it's just a form that we use.
  - Q It was a convenient place to set forth-
  - A Yes.
  - Q -- The payments which was made to him, is that right?

- A That's right.
- Q And you don't intend to imply by the term earnings that the payments were made for work performed from 19--June of 1966 through 1971?
  - A That's right, it was not earnings as such.
  - Q I have no further questions of this witness.

## RE-EXAMINATION BY ADMINISTRATIVE LAW JUDGE:

- Q Just one other point. You testified a little while ago that in order to fill some recognition of the advances that he made during the early years of the business, it was decided by the officers of the corporation to give him \$125 a month and \$140 a month, is that right?
  - A That's right.
- Q And you also said that you didn't give him more than what I just said because the company or the corporation rather, just could not afford to do it, is that right?
- A Well, I think that decision was made on the basis of our monthly payroll and what our accounts showed. I think it was sort of a decision made on what we felt we could give him.
- Q All right. In other words, you didn't think that the company could afford to give him more?
- A Well, I don't know if we thought we couldn't afford to, I think we thought we need to--because we have to keep a certain reserve and we were probably balancing what we had with what we could do.
  - Q Then wy is it in 1968, in December of that year? In view

of what you've said, suddenly a check is drawn for \$10,000 and given to him?

A Well, again it was a case of looking at our hole card and seeing what we could apportion here and there, what we needed to hold in reserve, and what we could—apparently that year we had a little reserve and we figure well now here's a time to do what we should have done a long time ago.

Q And is your answer the same for 1969, December 19697

A We had 2 or 3 years in there when I think probably we felt we had a little bit of a cushion.

Q Who decided the amount?

A Well, we all discussed it. My son, and our auditor and the bookkeeper of the books.

Q So you say it was consensus that it was going to be \$10,000 in December '68, and \$5,000 in December of 1969?

A Yes. That was from the picture that we had before us, what we thought we could do.

Q Did you get a bonus those 2 years?

A I don't know.

Q Did your son get a bonus?

A I have to look at the record. I don't know.

Q Without looking at the record, do you recall in 1968 and 1969 in December of both years when you gave this large sum of money--when the company gave this large sum of money to Mr. Miller, that the decision was also made, well, we have a pretty decent size pie this

year, if we can cut it up for one, let's cut it up for the other two?

A Well, I haven't really devoted myself to that part of the bisiness too much. I'm more interested in getting the work done. So if I got a bonus I would have to look and see. I really don't--I don't know.

- Q In other words, you can't remember coming to a decision well, to give \$10,000 to your husband--
  - A I can remember --
- Q You don't remember saying well, there's a lot more to the pie let's divide it more?
  - A No, sorry I never -- I didn't say that.
- Q You say you have no idea of the total amount that your husband loaned to the company during the early years?
  - A During the years, I do not.
  - Q Do you have any idea, a close approximation of what he lent?
- A Well, if I kind of went back over the years, I can remember the different things when therewere emergencies that he did go and pay for things.
  - Q And he was never paid back the same year?
  - A No, he was not.
  - Q Do you have any idea of the total amount?
- A No. I could come to some figure if I tried to think of all the incidents, the times that we needed equipment and they rushed out and got it.
  - Q Okay, roughly what would it be?

- A Oh, I'm not good at that kind of thing. I don't know.
- Q Well, \$300 for one machine and \$500 for another machine?
- A I remember one was around 12--\$1500 and the other--the first one me get was about \$350. We got a case to put mail in one time and that was around \$200. Well, I could go back and--
- Q All right. So, you have about \$1800--so it be \$2500, \$3000 that he loaned the company?
- A Oh, he's loaned the company more than that. I'm just talking about 1950.
  - Q No. The whole business. The entire loan.
  - A I don't know. I just can't--
- Q Is it conceivable that all the money that he put into the company it was never paid back amounted to \$4000?
  - A Oh, yes more than that.
  - Q \$5000?
- A It was a considerable sum and mainly it was the sum that kept us going, or we wouldn't have been there.
  - Q Fine. Could it have been \$6000?
  - A It could have been. It could have been twice that.
  - Q Could it have been \$12,000?
  - A Yes.
  - Q You don't know whether it was six or whether it was twelve?
- A I would be able to do some calculations but I just haven't up to now, but I remember certain specific things. I remember the payrolls, I remember times when we went to the bank and tried to borrow money--

Q How do you know--how did you know--how did you and your son and your husband know to what extent this recognition would go to?

A Well, I don't know if we did sit down and figure it up in dollars and cents.

Q Well, did you ever--did you or your son ever figure well, if we recognize what Mr. Miller has given, and instead of repaying him, we'll just give him a sum in recognition for his good deed for the company. Did anybody ever say well, how much are we going to recognize him with? Surely we're not going to--if we hit a couple of really good years we're not going to cut \$150,000 out of a pie because he never out \$150,000 in.

A That's true, and we never did that.

Q Did anybody ever say well, it's \$10,000 we're going to give him in 1968 because of recognition. Did anybody ever say did he ever put in that much?

A I think generally along the lines we had a pretty good idea because we've had the same auditor since the first year or two after we kind of got on our feet.

Q Well, did he ever say well, look he put in about ten grand, kay we have a good year we'll give him ten grand? Is that what happened?

A Well, what happened was in a year when we felt we had a little security we did attempt to--

Q Yes, but I want to know why was it ten grand? Why was it \$10,000?

A I don't know--

Q He may have put in only six, why give him ten?

A Well, we must have pretty good reasons for believing we had. Although I wasn't keeping a day to day account of that. As I've said we've had the same auditor who has been very close to us since the second year we were there and he had a pretty good idea what was going on. So I should say there was a pretty good estimate of approximately what it might be. I don't know if it was interest, if interest was added and all that business. And the expediency of having the money when we needed it.

Q And nobody determined in 1969, the following year, that there was some degree of recognition that the company should make?

A Yes, I think we still felt this. As a matter of fact I-we wouldn't have been there if it hadn't been for what he had done
for us. We would never have survived. So how you estimate that in
dollars and cents is something that I can't do.

Q Okay. No further questions.

MR. MARKS: May I ask you this? When you made these payments --

A Yes--

Q Did you feel--you testified that this was a family business, did you feel that by making these payments you were in any sense incurring a corresponding loss or corresponding detriment to yourself or to your son when the payments were made to your husband? In other words, was it a question of being concerned with the measure of his contribution in the early years so that you had to make an exact

A Ob--

Q Excuse me. Or something close to it, or was it something where you felt you were making a payment which was essentially to a member of the family and would not inure to your, or redound to your detriment in any way or to the detriment to the other principal of the corporation, Mr. Evers? Do you understand?

A Well, I'm not still sure. I thought at one point that I did.

Q Did you feel in effect that it was being paid out of your own pocket and that you were in effect losing money when the payment was made to your husband?

A Oh, no.

Q All right. So that--would it be fair to say then, that in view of that consideration you weren't concerned with an exact measure of what he had originally contributed. You were concerned with the distribution of a profit and you felt that he was an appropriate person to receive that profit because he had made this contribution above and beyond the call of duty in the early years of the corporation, is that correct?

A That's correct.

Q I have no further questions.

JUDGE: Okay, the witness is excused. Any other witnesses counselor?

MR. MARKS: Yes.

The witness, HARRY HUGHES, having first been duly sworn, testified as follows:

- Q Would you state your full name and address?
- A My name is Harry Hughes, 3951 Gouverneur Avenue, Bronx, New York.
  - Q All right counselor, your witness.

## EXAMINATION OF WITNESS BY COUNSELOR

- Q And what is your occupation?
- A I am a foreman--production man for Manhattan Direct Mail.
- Q And in that capacity what are your duties?
- A To receive jobs, give them out, take care of the equipment, make sure they are in working order, get the jobs through and so on.
  - Q What is the general nature of this equipment?
- A Offset printing, binding, photographic, which is making plates for offset.
  - Q Now, how long have you been with Manhattan Direct Mail?
  - A 6 months.
- Q And prior to that time, did you ever have any formal education or training with respect to the operation, or supervision of the equipment to which you've testified?
  - A I both had working experience and I went to school for printing.
  - Q What school did you attend?
- A I went to Manhattan School of Printing, in 1962, that was for 9 months. I had night courses, and I went for  $3\frac{1}{2}$  years to Printing Industries of Metropolitan New York, and there were courses in printing and production.
  - Q And thereafter, did you have the occasion to perform any work

connected with such equipment?

- A. Yes, I've operated all the equipment.
- Q Can you tell us the nature and extent of that experience?
- A Well, I've worked approximately 8½ years for University

  Printing, which was located on 125th and Amsterdam Avenue; I worked

  for O.B. Johnson, I was the night supervisor in the bindery and

  printing department.
- Q All right. Now, the equipment that you've been testifying to does that include what is known as a folding machine?
  - A Yes.
- Q Will you tell us what a folding machine is, and what its function is?
- A Basically a folding machine is for taking flat sheets of paper and folding them either for down to say, where I can say, to a mailing piece or to fold it down to be bound some other way.
- Q And what would be the rate of folding, or the number of pieces which would be handled by the machine, at any given period of time such as an hour, for example?
  - A Well, I would estimate, say, an average, of say, 3500 an hour.
  - Q 3500--
  - A Pieces an hour.
  - Q By a piece, you mean a sheet of paper, is that correct?
  - A Yes.
- Q All right. There are 3500 sheets of paper normally folded by this machine per hour, is that correct?

- A Give or take--you know.
- Q Am I correct in saying that one end of the machine is concerned with the feeding of these pieces into the machine, and the other end is an exit portion of the machine, is that correct?
  - A Yes.
- Q Now, I show you a series of photographs, comprising 8 photographs numbered on the reverse side, they are 1 to 8, and I ask you whether or not you can identify the type of equipment shown in these photographs?
  - A Yes.
  - Q What is the type of equipment
  - A This is called a bound folder, a 22 inch bound folder.
- Q And is that a folding machine of the kind that you've been testifying to?
  - A Yes, it is.
- Q All right. Do you happen to know the location of that particular machine?
  - A It is at the far end of the plant at Manhattan Direct Mail.
  - Q All right. Now, I'd like to offer these in evidence.

JUDGE: All right. What we will do, we will include --

MR. MARKS: I don't care. I don't have copies but it's all right.

JUDGE: All right, we will put all these in one envelope and the number 64, we'll fix the envelope within that envelope will be the series of pictures of this machine about which the witness is testifying.

MR. MARKS: May I have them?

JUDGE: Yes, sure.

- Q Now, during the operation of this machine, does it make any particular sound or noise?
  - A Yes, it does.
- Q And would you say by the way, that a plant such as that of Mounhattan Direct Mail is a quiet place in which this noise—the noise that you just referred to is readily distinguished?
- A I guess it is. If the folder is operating you definitely know that it is operating.
  - Q Is there a noise from other machines?
  - A Yes, there is.
  - Q And are there many other machines in the plant?
  - A Yes.

- Q All right. Now, during the operation of a folding machine such as the one you have identified, does it ever happen that the machine becomes clogged with these papers which are being fed through the machine for folding purposes?
  - A Yes, it does.
- Q Now, when the clogging occurs, it there a difference in the sound which comes from the machine?
  - A Definitely yes.
  - Q It is loud, or soft, or what? How does it change?
  - A It's louder.
  - Q All right. Now, when--let me ask you this. How many prople

usually operate this machine?

A One or two. It all depends on the particular job and how much it is, and so on and so forth.

Q Are there guards on any portion of the machine?which would prevent the operators of the machine from having access to its working parts?

- A No, there is none.
- Q There is no guards?
- A No. Not to the extent of the operating part of the machine.
- Q All right. Now, when the machine becomes clogged, and when there is this change in the sound which comes from the machine, by reason of the clogging, what is the appropriate thing to do in order to restore the machine to proper operation?

A Well, you would be at the end of the machine, not the feeding part, and normally it gets jammed into the either the rollers or the feeding part--I mean the rejection part of the machine.

- Would you adentify the photographs showing the portions of the machine to which you've testified?
  - A Well, I would say it would be 1 --
- Q You're referring to the Numeral L on the reverse side of the photograph?
  - A Yes.
  - Q All right. The number 1, what else?
  - A This part right here would be number 3
  - Q# All right.

- A Number 8. This one is not clear.
- Q Foreget about the clarity, is that the portion of the machine?
- A Yes.
- Q All right. And that's number 7
- A Number 7, right.
- Q All right. Now, referring to the photograph bearing the Numeral 3, on the reverse side thereof, there appears to be a number of rollers depicted in that photograph, is that correct?
  - A Yes.
  - Q At what end of the machine is that?
  - A That is at the rejecting end.
  - Q You mean the exit?
- A Exit of the piece of -- the sheet of paper which comes out and then goes into what we call angle folds. It is blades, plates I mean.
- Q All ri. Referring to the photograph bearing the Numeral 8 on tis reverse side, would you describe the portion of the machine depected in that photograph?
  - A The rejecting part of the machine.
  - Q You mean rejecting or exit?
  - A The exit I meant to say.
- Q And what are--can you describe briefly the mechanisms there in that portion of the photograph?
- A Well, you have two plates, which you can see here which you can adjust for different folds--
  - Q Yes --
  - A And you have your rejection or your track wheels drawn into

this plate and you have another plate, which is for another fold on the top.

- Q All right. That's in the upper portion of the photograph?
- A Right.
- Q Now, during the operation of the machine would you say that these parts move rapidly, slowly, or at all?
  - A Rapidly.
- Q All right. By the way, do you happen to know the horsepower required in operating this machine?
- A I'm not sure. I'm not really 100% sure but I think--I really don't know--2½ horsepower?
  - Q All right .
  - A I'm not sure really.
- 2 Now, referring to the photograph bearing the Numeral \$ on its reverse side, what portion of the machine does this depict?
- A This is just the track which I explained before, which are rollers which throw the sheet of paper into what we call the plates for folding.
  - Q Is that the intake or the exit?
  - A Exit.
- Q Exit, all right. And again the nearer--the frontward end of the machine as seen in the photograph bearing the Numeral I, what end would that be? Is that the exit end or the intake end, or what?
  - A The exit end.
  - ! That's the exit end. Now, I believe you testified that when

clogging occurred, it is necessary to remove the piece of paper, or pieces of paper which are responsible for the clogging in the machine, is that correct? How is this usually done?

A Well, normally if you would see it or hear it start to jam, you grab it and pull it so the operation continues.

Q And I take it from your gestures that that involves reaching into the vicinity of the moving parts of the machine, such as the rollers and removing the offending pieces of paper, is that correct?

A Yes.

Q All right. Now, --and I believe you mentioned that this may be occasioned when you hear the machine clogging?

A Yes.

Q Is that correct? Now, I'd like you to assume that a man 66 years of age is concerned with the oper--is involved or engaged in the operation of a folding machine of the kind to which you've been testifying and I want you to assume further, that he suffers from an impaired hearing to the extent of an 80% hearing loss in the right ear, and a 100% hearing loss in his left ear and a combined binaural hearing loss of 83% in both ears. I would like to know whether or not you have an opinion, with a reasonable degree of certainity as to whether or not operation by such an individual of a folding machine would be dangerous?

- A Yes, I would.
- Q And what is your opinion?
- A Well, first is that in the operation of any equipment, specially

in the binding part of it, is that your hearing tells you an awful lot. It tells you from jamming to-that's something is going wrong or even if you had a-what would I say-even if you had a piece of cloth or something and it be jammed, it could pull your hand in. And you can hear this fast, and if you don't hear it it could pull your finger in and you could lose your finger in there.

- Q Now, you're talking about binding equipment, but I'm talking about a folding machine.
  - A I mean the folder by binding equipment. I'm sorry.
- Q Well, are there occasions when there are momentary distractions to an operator of such a machine?
  - A Yes.
  - Q What would such occasions consist of?
- A Even conversation with somebody giving you orders for the next job, or the sheet is folding wrong, or something--you know--examining the machine and your attention is turned off from that--watching the machine.
- Q By another person or another event in the surrounding portion of the plant, is that correct?
  - A Yes, sir.
- Q Now, if while one's attention is distracted there occurs a clogging of the machine, they are different degrees of clogging, is that correct?
  - A Yes.
  - Q Depending upon the number of pieces involved, is that right?

A Yes.

Q And depending upon the extent of the clogging there's a greater or lesser sound, right?

A Yes.

Q In any event, is there a customary habit or habits, which an operator of such a machine develops in the course of his operation when he hears the clogging of the machine, what is his--what is the customary reaction of an operator of the machine with regard to--or in connection with his response to what he hears as clogging?

A Right. His normal reflexes, of course, is to pull out the sheets from the operating--while the machine is operating. Normal reflexes is to grab them sheets to stop them from hitting more sheets and keep the machine going. This is a normal reflex.

All right. And, this reflex or this habit occurs whether he is looking at the machine or not, is that correct?

A Yes, if I was distracted or anything and I heard that I would turn around and try to grab this and pull this out.

Q And if there is a minor clogging I take it it is not comparatively dangerous to remove the pieces of paper. A minor clogging as reflected by the intensity of the sound?

A Yes.

Q And if there is a major clogging, it may well be dangerous, is that correct?

A Oh, yes.

Q Now, in view of that, do you have an opinion as to whether or

minor clogging as contrasted to a major clogging of the machine while one's attention—while the attention of the operator is distracted from the operation of the machine so that he will engage in this reflex activity of reaching into the machine, even though he has not accurately accessed the extent of the clogging, is that dangerous?

A Yes, it is.

Q All right. Now, in your experience in supervising and working with and around folding machines, has it frequently occurred that people are injured in the operation of such a machine?

- A I've seen it happen, yes.
- Q How frequently would you say it happens?
- A I've seen, myself, maybe a dozen or 18 injuries.
- Q What was the nature and extent of the injuries that you've observed?
  - A well, either a bad bruise to losing a finger completely.
- Q And when the finger is lost, what is the part of the machine which usually accomplishes the injury?
  - A The rollers on the --
  - Q The rollers dipicted on the photograph bearing the Numeral 7/
  - A Right.
- Q Now, so that as I understand it this is your opinion, that if an operator of a machine, at the age I've indicated, and having the hearing loss that I've indicated is distracted from the operation of the machine, in the matter I've indicated and if the clogging occurs, as I

it frequently does, then it would be dangerous for him to engage in this reflex activity whereby he would reach into the working parts of the machine and expose himself to personal injury, is that correct?

- A That is my opinion.
- Q Now you also indicated that this machine may be operated by two people as well?
  - A Yes.
  - Q Would you describe that operation?
- A One would be feeding it and the other one would be on the outtake of unloading it and putting it into boxes, or adjusting--you know--the parts in front of the machine.
- Q So that there would be one person in the front of the machine and the other person would be in the rearward portion of the machine?
  - A Right.
- Q Now, do you have an opinion as to whether or not it would be dangerous for one of those persons to operate the machine while he was 66 years of age, or older, and while he was suffering from impaired hearing to the extent that I have indicated?
  - A Yes, I think it's very dangerous.
  - Q Why?
- A Well, if I, for argument sake, the fellow with the impaired hearing just walks away from that machine and say he is feeding--he is taking care of the feeding part of the machine, and I'm down underneath adjusting the plates, which would be--you know--

- Q --You would be at the other end of the machine?
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- A Right. And he does not see or hear me--
- 'Q Yes.
- A He puts on that machine while I am there, I could easily lose my fingers or--you know--
- Q Because your fingers would be in the vicinity of the working parts of the machine?
  - A Right.
- $\Omega$  Which operate at this extreme rate of speed you've been telling us about?
  - A Yes.
  - Q All right.
- A Or if I've got a jam-up or something, or even a piece of cloth clothes are caught and he does not hear me and stop the machine, I can get hurt dangerously.
- Q All right. One other question. In the last—in the period that you've been working in Manhattan Direct Mail, when people of normal hearing, as far as you can tell, operate this machine how many accidents of the kind you've been testifying to have occurred? In connection with the folding machine.
  - A Nothing major at all. No.
  - Q How many accidents?
- A I would say there was one, one or two, if I can remember correctly. I think the only one I can really remember is the one boy distract the attention to another boy, and his finger got caught but

not bad enough -- he got injured but no major injury.

- Q Within the last two or three weeks, wasn't there an accident where a man had his hand injured?
  - A. That's the one I'm speaking of.
- Q I see. All right. And apart from that were there any other such accidents?
  - A None that I can remember.
- Q And you testified you were there for approximately 6 months with Manhattan Direct Mail, is that right?
  - A. Yes.
  - Q. All right. I have no further questions of this witness.

\* \* \*

JUDGE: Okay. We will take a 5 minute recess.

MR. MARKS: Right.

(Off-record at 11:30 a.m - resumed at 11:39 a.m.)

JUDGE: The witness was excused at the beginning of the recess, we are now reconvened. Will you call your next witness, counselor?

MR. MARKS: Yes, I call William L. Evers, as my next witness.

The witness, WILLIAM L. EVERS, having first been duly sworn, testified as follows:

JUDGE: Would you state your full name and address?

A William L. Evers, 793 Jewett Avenue, Staten Island, New York.

JUDGE: All right counselor, your witness.

EXAMINATION OF WITNESS BY COUNSELOR:

- Q And what is your occupation or profession?
- A I am an attorney, and I work for Manhattan Direct Mail, and I am the corporate secretary.
- () All right. Now, as an attorney can you tell us whether or not you practice on a full time basis?
  - A No. I do not.
  - And what activity occupies most of your working day?
  - A General management of Manhattan Direct Mail.
- Q All right. And what is your relation to Marie Evers Miller and William Dana Miller?
  - A Mrs. Miller is my mother, and Mr. Miller is my step-father.
- Q All right. How long have you been working with Manhattan Direct Mail?

A I was--I had started working with them in 1951, after I passed the bar exam and have worked pretty continuously since then with certain periods of time when I was with the New York State

Crime Commission. I was on Wall Street with McLanahan, Merritt and Ingram (phonetic) and I was on Broadway, in Brooklyn, with McCoombs & Wilson.

- Q And are you working with Manhattan Direct Mail at the present time?
  - A Yes, I am.
- Q And during the period from 1966 through 1971, were you employed at Manhattan Direct Mail?
  - A Yes.
  - Q All right. In the same capacity that you're now employed --
  - A Yes
- Q Is that correct? And you mentioned two law firms, I believe, when did you leave the last of those law firms, with whom you were employed?
- A That was a period of less than a year, and it occurred in the early '60's, from--let me--roughly '62 to '63.
  - Q And after that, did you work with Manhattan Direct Mail?
  - A Yes.
  - Q And that was substantially on a full time basis, is that correct?
  - A Yes.
- Q All right. Now, did there come a time--withdrawing. Up to and including May of 1966, to your knowledge, did William Dana Miller work for Manhattan Direct Mail?

A Yes.

Q Will you tell us the general nature of his work during that period?

A During which period?

Q Up to and including May of 1966, and during the time that you were working with Manhattan Direct Mail.

A Well, when the company was first started, Mr. Miller was an oil geologist working Esperanza Oil, and he continued to put his main efforts with Esperanza. However, he was very significantly involved with Manhattan Direct Mail in a financial way, in the way of financial guidance and counselling, as well as—usually in the evening after he would put in his work at 120 Broadway.

Q After 19--in and after 1958 and up to and including--withdrawing. In and after 1958, when he retired from Esperanza Oil Company, and up to and including May of 1966, did he work during the day at Manhattan Direct Mail?

A Yes, he did.

Q Can you tell us the approximate number of hours per day that he worked there?

A Well, I would say that he put in at least 8 or 9 hours a day, and we worked 7 days a week.

Q All right. Now, during those 8 or 9 hours a day, what was the kind of work that he did?

A He was specifically--run a folding machine, he would carry out

our deliveries and trucking for which we have special problems, meaning that, our delivery schedules were irregular, and we may very well have to deliver mail bags to Kennedy at 2 o'clock on Sunday afternoon. At such a time you cannot have a regular truck to do it.

Q Was there any paper work or desk work that he did during the time he was working 8 or 9 hours a day?

A He kept production schedules, he did the timing of the job-estimating on the job time in the sense that--for us our billings very
difficult unless we know exactly how long a specific takes. Very few
of our jobs are ever the same, even typing and reproducing a manual,
for instance. The manuscript may come in handwritten. One manuscript you can read very easily, the next one you cannot read easily.
Therefore, the time difference just simply in the man's handwriting
is significant. He kept time schedules and records there for a long
period of time after he left Esperanza, we were working for American
Airlines and we had to be extremely competitive. So he kept very
close time cross charts on every job that we did.

Q All right. Did his work involve the necessity to communicate orally with other people in the plant?

A Oh, yes.

Q And was that a frequent situation?

A Yes. Our business is capable of making many many errors. It's a service business.

Q No. But was he required on frequent occasion to talk to other people in the plant?

- A Yes. This communication is very necessary.
- Q And was he required to communicate by telephone with the people outside of the plant?
  - A Yes.
- Q All right. Now, did there come a time in 1966 when, as far as you know, by reason of impaired hearing he terminated his services at Manhattan Direct Mail?
  - A Yes.
  - Q When was that time?
  - A Approximately May of '66.
- Q All right. And now, at that time as I understand it, you were married, is that correct?
  - A Yes.
  - Q And what was the name of your wife at that time?
  - A Gladys.
- Now, at or about that time were you experiencing any matrimonial difficulties with Gladys Evers?
  - A Well, I had been for some years, yes.
  - Q Can you tell us in a general way the nature of those difficulties?
- A The unfortunate situation was that she was suffering from an emotional misadjustment which made it--well seemingly, made it impossible for her to function under the stresses of a home.
- Q And in connection with that was any medical diagnosis ever made of that condition at that time?
  - A At that time, yes, she had seen I think 3 psychiatrists by that

time.

Q All right. Now, do you recall what diagnosis they made of her condition?

A The diagnosis they made at that time were that she was all right.

- Q She was all right?
- A But that was not my opinion.
- Q All right. I have to explain that. That was not a direct --
- Q All right. Never mind about the explanation. Let me ask you this. Did there ever come a time when she was confined to a mental institution?
  - A Yes.
  - Q When was that time?
  - A 1968.
  - Q And where was that mental institution, and what is its name?
  - A Glenwoods, in Grand Rapids, Michigan.
  - Q Was there any other institution to which she was confined?
  - A Yes, she was later committed to the Michigan State Mental Hospital, in Kalamazoo.
    - In what year?
    - A Same year.
    - 12 1968?
    - A '68.
    - Q Has she been discharged from that hospital, to your knowledge?

A I think she's on out-patient care at this time.

Q I see. Now, up to that--prior to that time, did this situation that you've been testifying to, reduce itself to litigation?

Did it take the form of litigation?

A Yes.

Q And what was the nature of that litigation? It was an action for what?

A Well, there had been a history which I want to answer your question properly. There had been a question made—the particular syndrome that happened started in '62 when her mother died. It had an adverse affect on her. There was a series of litigations. She had 8 lawyers before I got rid of her.

Q Just tell me about the litigation.

A Well, specifically in 1966, it had reached a point where I had accumulated enough evidence I felt to shoulder and bear the burden of going for the custody of the children.

- Q Excuse me, what was the nature of the action brought in 1966?
- A In 1966, I brought an action to obtain custody of the children.
- Q It was not an action for divorce?
- A No.
- Q All right. And where was that--what was the venure of that action?
  - A Brooklyn.
  - Q The Supreme Court in Brooklyn?
  - A Supreme Court, Brooklyn.

Q All right. Now, in the course of that action did you bring on an "Order to Show Cause" supported by a petition aimed at securing custody of the children of your marriage with Gladys Evers?

- A Yes.
- Q And how many such children were there?
- A Four.
- Q All right. And what were their ages, in 1966?
- A Oh --
- Q Were they infants?
- A 6 to 3 months.
- Q 6 years to 3 months? All right. Now, I show you this copy of an--

JUDGE: Excuse me. Mr. Evers, your response should be oral.

Don't shake your head.

A Thank you.

MR. MARKS: I show you this copy of an "order to Show Cause" bearing Index #11202 - 1966, in the Supreme Court, Kings County, a petition in support thereof, dated September 2, 1966, and having year signature. A verification, or a copy of a perification of that petition, and an order dated September 27, 1966, granted by the Honorable Murray T. Fident, Justice, in connection with this "Order to Show Cause". Can you identify this? What are they? What are they, other than what I described. What is the nature of the petition, the order to show cause and the order ultimately granted. In brief.

A This is my action to gain custody of the children based upon the unfitness of the mother to care for the children, and the fitness of the father in conjunction with his--my folks to provide a better opportunity for the children.

Q May I have that? I should like to offer this in evidence.

JUDGE: All right. Counselor now submits an order in the case of Evers v. Evers, Docket Number 11202, 1966, Supreme Kings. This series of papers are order to show cause, which we will mark them all as one group, and this will be marked into evidence as exhibit 65.

MR. MARKS: Your honor, I should like to point out that in paragraph 5, page 2 of the petition, reference is made to the fact that the respondent, meaning Gladys E. Evers, the then wife of the witness is mentally ill. That she is, and I quote "A woman of ungovernable and vicious temper and has on a number of occasions assaulted your petitioner, abused him, and subjected him to other manifestations of physical violence. Sometimes in the presence of their children. That because of the nature of the respondent's mental illness, she has attempted to commit suicide and is a dangerous influence on the children who stand in peril of being subjected to her violence against them." And then paragraph 6 of the petition goes on to state, your petitioner, meaning William L. Evers, was therefore compelled to take this step of moving the children from the maritial abode in order to protect them from their mother, and in order to safeguard their vital and imperative physical moral and spiritual well being. And then in paragraph 8, on page 3 of the petition, it

upon the service of these papers on the respondent, she will endeavor to seige the children and move them from the jurisdiction of the court. And it is, therefore, imperative in order to safeguard their most vital interest, that the court stay and enjoin her pending the final determination of this matter from doing so. And then significantly, in paragraph 9, it begins by the statement, that your petitioner is well able to care care of the children, assisted by his parents who are well qualified to do so, and to whom the children are attached, love and cherish. Now, to whom were you referring when you referred to your parents?

- A Mr. and Mrs. Miller.
- Q And that would include the claimant, William Dana Miller, is that correct?
  - A Yes.
- Q All right. Now, you have referred to the vicious temper and ungovernable inclinations of your first wife, do you remember any incidents in which those inclinations and not temper, were exemplified?
  - A There's a long history of that.
  - Well, did she ever make any threats against you, of any kind?
  - A Many times.
- Q Did she ever refer to the use of the Mafia, directly or indirectly in carrying out those threats?
- A Yes. I was to be murdered in my driveway. I had-her associates at that time consisted of the group that ran the restaurants and bars

in Greenwich Village, the gay bars. We were very well connected at that time with the more seemly side of Greenwich Village.

v Q Well, I don't understand what you mean when you say well connected with the more seamy side of Greenwich Village. When you say the Mafia, are you identifying this group with the management of these bars you've been referring to?

A Yes.

Q All right. Did you feel when she made those threats that she was using the--that she was threatening you in a loose way and not literally?

- A No, she had the facilities at hand.
- Q What facilities?
- A The--her friends were bookies. They were the strong arm men of page 3, there've been several murders--
  - Q Excuse me. What do you mean by page 3?
- A That's a bar uptown, sir. It was a gay bar. What it is now I don't know.
  - Q Yes, go ahead.
- A And my--this was purely by chance but when she started to run, the people that she ran to were the people who she felt would give her protection.
  - Q May I interrupt you a moment?
  - A Yes.
- If I recall correctly, among the work that you did was work for the State Crime Commission, is that correct?

- A Right.
- Q And what did you do for the State Crime Commission?
- A I assembled evidence, and I also carried on telephone investigations.
- Q So, that in the course of your work you were acquainted with the identities of members of the underworld, is that correct?
  - A Yes.
- Q So that you were able to access the validity and the seriousness of the threats which your wife was making, is that correct?
- A In that job I worked with both the City, State and Federal law enforcement officers, and we carried on the waterfront investigation.
  - Q And will you answer my question?
  - A This is exactly what I was doing, yes.
- Q You were able to access whether or not she was serious about making these threats of physical violence, is that correct?
  - A That's right.
- Q Now, did she ever make any threat with respect to the safety of the children?
  - A Yes.
  - Q What were those threats and when were they made.
- A Well, on two previous occasions I had taken out writs of habeas corpus to prevent her from removing the children from the state. Both of those times I had used police assistance to enforce the writs.

Q Yes.

- A And the violence. I can go on for hours.
- Q Just in brief.

A Well, she was soliciting the assistance of these people and she was extremely beautiful girl and had the means and ways of paying-returningethe favors. And she presented me with a situation where if I did not maintain an armed fortress in my house, I would never have been able to keep the children in New York State.

Q All right. As the result of this situation, did you take any action aimed at remedying it, apart from the legal proceedings to which you have testified?

A Yes, I had to be very concerned about the security of the children. In that respect, I had detectives. The children were constantly watched by detectives and the problems—the specific problem was if I were to do anything else, I had to see that it was a member of the family with the children. I mean in addition to that.

JUDGE: Mr. Evers, I think what your attorney is trying to get you to say is there came a point in time when the children were removed from the household or--

A That's right --

JUNGE: By themselves, or you took them out then you took them someplace.

A Yes--

JUDGE: So what he wants to know did such a thing occur, when did it occur, were all the children taken out, where did you go with them,

did you deposit them someplace, did you put them in a home, did you put them with your parents, did you do that? That's what he wants to know. Okay?

MR. MARKS: That's what I would like to know.

A Yes. Okay. I rented an apartment in Brooklyn, suitable in size and character for my parents and myself, and the children to live. And I removed the children to Brooklyn. My parents were good enough to come and move with me into this new apartment and at that point I started my action for custody.

Ω All right. Did there ever come a time when the children left Brooklyn, and when your parents left Brooklyn?

A Yes.

Q When was that time?

A That was later in 1966, after I had been awarded custody, after I was divorced. I then returned to Staten Island so the children—the schools in Brooklyn were very bad, and in the interest of getting them back into the Staten Island schools, we returned to Brooklyn. My parents, myself, and the four children.

JUDGE: You mean you returned to Staten Island.

A I beg your pardon?

JUDGE: You returned to Staten Island.

A Right.

JUDGE: You said Brooklyn.

A I'm sorry.

MR. MARKS: Now, the situation you've been describing, did it exist in June of 1966?

A That's when it existed.

Q All right. Now, what role, if any, I know you referred to your parents, what specific role, if any, did you contemplate could be played by William Dana Miller in this situation?

A It was imperative to my mind that a responsible member of our family had to be with those children 24 hours a day. Because, were Gladys to reappear, either with herself or with a legal process, or with strong arms, she would have more influence, at any given point in time, than any maid or any hired detective I could have. So that I felt that any member of the family and, in fact, that was what happened. I was there and the only time I was not there was when either my mother or Mr. Miller was there.

Q And when you were not there, would be the time during which you would be working at Manhattan Direct Mail, is that correct?

A That's right.

Q And as I understand it, your mother would also be working concurrently with you at Manhattan Direct Mail?

A Right.

Q So that the only person who could be present with the children, would be your stepfather, William Dana Miller, is that correct?

A Also if you recall, we said the legal proceedings going on.

So she might be at the plant, I would be in court, and Mr. Miller would be home taking care of the children.

Q Very well. Now-- so that that was the occasion, or that was the role which he filled after he left the company, in June of 1966 and thereafter until the matrimonial problem was resolved, is that correct? Now, how long was it before the matrimonial problem was finally resolved and the custody of the children you felt was sufficiently assured to you? Or to phrase it in another way, there came a time when you no longer felt that there was a serious threat posed by your first wife with respect to the custody of the children. When was that time?

A Frankly, I consider her still a threat. The fact was that last year I remarried and upon remarrying, we moved to a new house.

Q I see.

A But I still consider that a very serious threat and I worry about it, and as much as discussed it yesterday.

Q But at least your present wife is able to remain with the children and fill a protective role, is that correct?

A That's right.

All right. Now, there has been some reports and revidence alleging that various personnel of Manhattan Direct Mail were not cooperative with the Social Security Administration when they attempted to investigate the right to benefits by William Dana Miller, and I ask you whether or not you—there ever came a time when you were approached, by telephone or otherwise, by such investigators with a request for information concerning the records of the company, or of William Dana Miller, in connection with the company. Did there ever come such a time?

A I have had many people from Social Security come down, yes.

Q All right. Can you tell me how many times there were visits by investigators of the Social Security Administration, approximately.

A I would say 10 or 12.

Q All right. And when did those visits occur? During what period of time?

A They occurred--roughly 1969, roughly '68--late '68, '69. '70/Q All right. Now, when the request for information was made of Manhattan Direct Mail, to your knowledge, was that information forthcoming from Manhattan Direct Mail?

A Yes.

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## EXAMINATION OF WITNESS BY ADMINISTRATIVE LAW JUDGE:

Q Do you know why Mr. Miller was given one check for \$10,000 in December 1968?

A I think I do. Our busine is pretty much run by our accountant. I'm not totally in agreement with what he does. But needless to say, I'm the son in the business and therefore, I work with certain

handicaps. But at the end of each year, we kind of add up the business to find out what we did and what we didn't do. Because, frankly, any other time during the year we don't know what we do. We get quarterly reports, but I'll be sitting there working like--doing a lot of business and the reports--accountant comes in with sad faces and says you're doing terrible. And the next quarter--

Q I want to know-there came a time before December, or in December of 1968, somebody made a decision that a check should be drawn and that check should be for \$10,000, and that it should be given to William Dana Miller.

A I think what you asked before was correct. I -if my recollection is right, we all, the three of us, got checks on or about that same time.

Q How much did you get?

A If I would remember, I got something like 5--this is guessing, I don't really remember, but I guess. But I don't remember getting anything like 10, and in a sense--let me explain that. I think that this works to my benefit, and I appreciate all that my parents have done for me. They've been very helpful---

- Q But why did Mr. Dana-William Dona Miller get 10 grand?
- A Okay.
- Q In one lump sum in December 1968?

A If-the way the stock is split, he owns-everybody-they own most of the business, I own practically nothing of it. I have like 2%, maybe 5. If dividends were declared, to spend off the profits,

naturally I would wind up much lower than I am. So rather than declare dividends as a means of splitting up the profits, I think that this means of putting out bonuses or whatever you want to call them -- I dont' think we put words to them. I don't know what the words would be. In this way I would come up with a little higher percentage than I would if dividends were declared.

Q So you had X dollars in the pot, so you cut it up 3 ways, 3 unequal ways, you got about 5 grand, Mr. Miller got 10 grand, and your mother got what?

A Well, she might have gotten 2 or 3. Now, this is my recollection.

- Q After yours?
- A Yeak.
- Q Why?

A Most of these decisions are the accountant's. This soundsyou know-ait's really the way--

- Q Nobody asked why?
- A I beg your pardon?
- Q Bobody asked why?
- A Oh, sure.
- Q Well, did you ask why?

A Well, one of the things is what you mentioned before, in that the amount of money that Mr. Miller has invested in the company, is to my way of thinking, closer to 25 to 50 thousand, than anything having to do with 4,5,6 or 12.

- Q But, why didn't the check---why was not a check drawn to repay a loan?
  - A Because it wasn't set up as a loan. He didn't-
  - Q So you decided to give him a part of the profits for 1968?
  - A Yeah.
  - Q At the same time you got a share and your mother get a share?
  - A Yeah.
- Q And the one who decided the share was the auditor? The accountant?
  - A Fretty much. I don't approve of what he does.
  - Q Nobody questioned him?
  - A I questioned him. I'm questioning him right now.
- Q Well, what if he decided to give Mr. Miller a \$100,000, and you nothing? You just sit back and say, I don't have any say, he has the say?
- A I'd be more concerned if the accountant gave himself a \$100,000 and me nothing, which is more closer to the case.
  - Q I want to know, who made the decision?
- A I think what you have to-those kind of decisions may sound strange, but it really isn't. The accountant kind of figures up a rough figure, and we go along with it. We all know what's going on, it's not that-
  - Q Well, in December 1969, Mr. Miller got \$5,000-
  - A Yes.
  - Q Right?

- A Yeah.
- Q What did you get?
- A My recollection is that I have received a couple of bonuses.
- Q No. Just Docember 1969.
- A You can't-to be truthful, I don't remember.
- Q All right. You remember what your mother got?
- A No.
- Q Who rendered the decision for \$5,000?
- A Again it would come-the accountant. You see, the significance of the December is, that by that time he has lumped together all of his mistakes-
  - Q But who made the decision to do it?
- A Well, it comes in that there's X amount left and that you distribute X amount before the end of the year.
  - Q Well, who decided that there was going to be a division?
  - A I think it's the accountant.
  - Q You don't know?
  - A Well, I would say that he would propose it and we would affirm it.
- Q Mr. Miller didn't say, this is what I want you to do, and figure out a way to do it?
  - A No. I can clearly say that.
  - Q He never said that?
- A No. I didn't know what you were driving at. No, I would definitely not say that. In that-at the end of the year-and this isyou can go back to all of our records, they've always been this way,

We would find out what we did, now, really in our business there's no way of knowing any other way. Because if you took a quarter—the first, second and third quarter those figures don't mean a darn thing.

Q When did you move from Brooklyn with the children, to Staten Island?

A I would say October of '68. It was late-it was after school bad already started.

- Q New long did you live in Brooklyn?
- A 166.
- Q You went into Staten Island in October 1966?
- A Right.
- Q Now long did you live in Prooklyn?
- A Oh, less than--well, it would have been May of '66. May, June July, August--
  - Q So you lived in Brooklyn for 6 months?
  - A Right.
  - Q And the children were with you in Brooklyn?
  - A Yes.
  - Q And in Brooklyn, Mr. Dana and your mother was there?
- A They moved from Riverside Drive, which was where they had an apartment at 36 Riverside Drive, they moved with me to Brooklyn.
  - Q In may of '667
  - A Roughly May, yes.
  - Q And that's when Mr. Miller started to take care of the children?

A That's right.

Q You didn't think he'd have a problem with a hearing deficit, with four little kids running around?

A No. I definitely did. Mr. Miller-when I say he took care of the children, I always had live-in maids. As a matter of fact, the girl that I have now married was a private detective and she was in Brooklyn also. Now, when I say that I felt-that the possibility of my being shot was a good one, I played a calculated risk because just as she had friends, I had friends. And if something had happened to me, it would have been very serious. Now, as you know, nobody fools around unless there's money involved. The only thing I make perfectly clear here was that I was after the welfare of those children. Now, if I-

Q Why did Mr. Miller come to Brooklyn, stay for 6 months with the family, with you and your children-

A Right.

Q -- And then go to Staten Island?

# Well, because I moved to Staten Island. We all moved to Staten Island.

Q But you had a live-in maid. You say you wanted Mr. Miller to be there because he's closer to you tham a maid?

A Absolutely. What could a maid do if a detective or a cop showed up with a order? What would

Q Okay. So yes wanted him there as to guarantee that they would be there when you got back every night, is that right?

A I was there, or my mother was there, or Mr. Miller was there.

That house was never uncovered for a minute.

Q All right. So, from May 1966 to December that Mr. Miller actually skywed up in Manhattan. Do you know how many times a work, or how many times a month Mr. Miller actually showed up on the business premises of Manhattan Direct Mail, between May '66 and December '69?

A May '66 and December of '69. I'm afraid I would be as vague as—I don't know. It could be 4 times a month he would drive my mother in and be'd pick her up. He would come in to go to the bank, he would—

- Q Well, wasn't he taking a rick?
- A What risk?
- Q He left the kids alone.
- A No. No, No. Those kids were never alone. I guarantee you-
- Q There was no member of the household there?
- A Oh, yes there was.
- Q Who?
- A Because if--
- Q Who? Who?
- A Then it was me. I guarantee you-
- Q Bo you say than, that every time he left-every time Mr. Miller left the house and went to the business, and stayed at the business for about an hour or so and then came back, or went to a bank and came back, you were never at the business you were always at home?

A You'd better believe it. Unless-

Q I don't have to do anything. I'm trying to find out what the truth is.

A I'm sorry that was a figure of speech. Of course, the kids on occasion were in school. If there was a time when all four children were in school, then he's not logged in. But I will say, and I make no equivecation about it, that there was never a time never a single time during all of that period, that those children dich't have one of the family near them. Now, we also had live-in maids, we had remedial reading teachers—

Q All right. So you say, as a general rule between May of '65 and December of '69, whenever Mr. Miller did go to the office of Manuattan Direct Mail, you would have no idea of how long he stayed or what he did when he was there, because you were home?

A Mo. I didn't say that. Because if the children were protected, and I use the word protected, then Mr. Miller-and I wasn't the only one that had to do this. If-

Q So you say that a lot of times when he came in during the last-between 1966 and 1969, you were on the business premises?

- A Yes.
- Q Ckey. You say about 4 times a month he would come in?
- A I just picked a figure out of the air. But-
- Q Would that be a fair approximation?
- A Fair approximation.
- Q All right. When he did go in, how long did he stay, on an average?

A He would wander in, he would wander out. & hour, an hour, 33

Q Did you ever say, as long as you're here make yourself useful?

A No, I didn't. I didn't specifically. I have reasons, if you want to know.

Q Well, you never made a suggestion to him, in a nice way, would you take care of this machine, or take care of this delivery while you are here?

A Well-

Q I mean you only come in once a week, so as long as you are here, do something.

A Mr. Miller has -- I had forgotten about this until Mr. Haghes reminded me before. Mr. Miller has been injured several times seriously on the folding machine. None of the times would be go to the doctor. None of the times would be do anything but pour resin in the cut and wrap it up with bandages.

Q So you were afraid of a recurrence?

A It's-no question about it.

Q So you decided that you wouldn't ask him or tell him to do anything?

A I love him dearly, but he will tell you that I go up the wall when he gets near one of the machines.

Q Owny. No further questions.

MR. MARKS: I have no further questions.

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JUDGE: All right. The witness is excused. Any other witnesses

MR. MARKS: No.

JUDGE: Any other papers you want to submit?

MR. MARKS: No.

REGE: You have a right to final argument. Do you wish to make one?

MR. MARKS: Yes, I do.

JUDGE: Go right ahead.

## FINAL ARGUMENT BY ATTORNEY

At this time your honor, I should like to thank you for the patience and attention you've shown in this ease, and more than that, for the judicial attitude you have displayed in considering the facts, and the discernment you've displayed in questioning the various witnesses to unearth facts which I was not successful as your honor was successful, in unearthing them. I've practiced approximately 25 years, I know that all too frequently such an attitude is not encountered among the judiciary, and I am greatful for it, and both I and my client have full confidence that whatever decision you reach in the case will be a fair one. The claimant, as you know, is a man who for the most of his adult life has lead an extremely active outdoor life. In the rather remote parts of the world searching for this precious resource we call petroleum, which all too frequently is an allusive one. When he came to Manhattan Direct Mail, I am sure that he was chafing at the

bit, and perhaps at a loss as to how all of his energies could be employed. And it has been testified that he performed gneral executive work, and various witnesses have indicated different aspects of the kind of work which he performed. Whether it was a matter of concern with the salaries of personnel there, employment or their discharge, the purchase of equipment, general financial policy, all of this work required a normal hearing ability, so that he could converse with the people involved in the normal intercourse among people in business. So also, when his energies weren't employed in that way, he found time to operate this folding machine. Where again, it was essential that he have at least a hearing ability adequate for coping with the emergencies which have been described, in connection with the operation of the machine. Baergencies described by Mr. Hughes. And all of this was done until June of 1966, until much against his will, he was forced to retire because his hearing became so impaired that he simply could not perform these functions. He couldn't converse with people on the telephone, he couldn't converse with them directly, and it was a matter of extreme personal risk to operate this folding machine by reason of his impaired hearism. He had tried to remedy the situation by purchasing a number of hearing aids, at considerable expense. I believe the testimony is to the offect that at least 5 or 6 successive hearing aids had been purchased. They all purved unsatisfactory. We don't have to speculate as to the cause of the deafness which he incurred. Apparently it was due to the large

quantities of quinine which he had taken to remody the malaria contracted in his early days as a petroleum goologist, and which he continued to take in substantial quantities ever since that time. If we look at the report of Dr. Massarella, which is exhibit 47 in evidence, at page 2, we have a confirmation of that fact where he says in the third paragraph. It is my opimion that Mr. Miller has a sever handicap due to his hearing loss. The prolonged use of quinine over so many years significantly contributed to this hearing loss. Now, Mr. Miller testified that during-from the period including June of 1966 through 1971, the hearing loss which he had suffered remained unchanged, substantially. It didn't improve. It remained substantially at the level it had been and we have again, in the opinion of Dr. Massarella, on the first and second paragraphs of the second page of that opinion, a statement to the affect that Mr. Miller's hearing loss is calculated as an 80% hearing loss in the right car and a 100% hearing less in the left ear. There is a 83% binureal hearing loss. And them, in the next paragraph a review of Mr. Miller's records from boaring aid purchazes shows that this degree of hearing loss has definitely been present from at least 1968 as document, and the word probably is decumented, by an audiogram done at Bell Tone Hearing Aid of Statem Island. In all probability, it has been present from 1965 when the first hearing aid was purchased. I might say that these are objective demonstrations of his hearing disability as further confirmed by the most recent objective tests which were made of his auditory ability and which are referred to on the first page of Dr. Massarella letter which I've been

quoting. The letter of July 3, 1973 marked in evidence Exhibit 47. We know further also that your honor has judicially noticed the medial authorities indicating that the injection of quinine in the matter and to the extent taken by Nr. Miller may all to frequently be accompanied by deafness of greater or lesser degree and duration. Now, we have a situation as a result of this physical disability whereby--June 1966 there was no significat way that Mr. Miller could continue working at Manhattan Direct Mail in the way that he had been working. He coulded it was essential to the bulk of his work that he be able to hear people on the telephone, face to face, and in connection with this machine that he be able to distinguish the various sounds eminating from this folding machine. In affect, he was physically disabled, and it provided a perfectly proper occasion for retirement, as supplemented by the noed for his presence at the home of his step-son, so that he could play the protective role with respect to his step-son's children. So that there appears to be no question but that he did, in fact, retire in June of 1966. I might say that as far as I know, the law makes no distinction with regard to the propriety of retirement, or even the morality of retirement. The law is concerned only with the question of whether or not one did, in fact, retire. In this particular case we have retirement for a perfectly proper reasons. Now, the burden of proof, as I understand it, in a case of this kind rests initially upon the claimant. But as in all judicial proceedings and as I understand it is the general rule in administrative proceedings, including Social Security hearings concerned with disability benefits. Once the claimant makes out his prima facie case, a prima facie right to benefits, then

the burden shifts to the Secretary of Health, Education, and Welfare, to come forward with evidence showing that the claimant does not have a right to benefits. Or to put it another way, the case seem to indicate that there must be some substantial evidence adduced by the Secretary of Health, Education, and Welfare, showing that there is no right to benefits. Now, we submit that these criteria have not been met by the Secretary of Health, Education, and Welfare. He hasn't most that burden of proof, he hasn't come forward with substantial evidence of any kind to rebutt the claimant's right to besefits. The principal contention with which the Secretary of Health, Education, and Welfare was concerned was his contention regarding earnings, the mentally payments, and then the lump-sum payments made in one or more years during the period between Jume of 1966 and 1971. And based upon those payments, and we don't deny that those payments were made, it is inferred or deduced that these were earnings, but the law is not to that effect. The law is to the effect that in addition to the showing of payments, it must be shown that they were earned. And I would like to rafer year honor to page 228 of the Social Security Mandbook, published by the U.S. Department of Health, Education, and Welfare, the Social Security Administration as of February 1969, which I believe is the latest edition, and on page 228 if I may exote Section 1320, at the bottom of the page it states: Payments after age 65 to a man (or after age 62 to a woman) who continues in an employment relationship with an employee are not counted as wages for Social Security purposes if (a) the employee did not actually work for the employer during the

period for which such payment is made and (b) the pay is other than all wacation or sick pay. Now, there's no question about variation or sick pay hard. And all that we are concerned with here is whether or not he autually worked for the employer, or the alleged employer, during the period for which such payments were made. And all of the evidence goes to prove everwhelmingly that he didn't work because he couldn't work, and there is absolutely no evidence to the contrary that he could have worked and did do the work in Manhattan Birect Mail of any kind whatsever. This is based out only on his own testimony, but on the testimony of Nrs. Miller and Mr. Evers, and also correborated by the report of Dr. Massarella to which I have referred. I might say, that in one of the exhibits in the file of this proceeding, I refer especifically to the letter of March 30, 1972, which is marked exhibit #7, reference is made to the fact that Mrs. Miller indicated in response to an inquiry--

JUDGE: Browse me, that's a letter that Mrs. Miller wrote.

MR. MARKS: Yes. Reference is made to the fact that in that letter there is information to the effect that there was a loss of hearing by the claimant, and this letter was communicated to the Social Security Administration, and even though it was essential that there be some kind of investigation indicating, or to the effect that not withstanding this disability he be able to work, apparently no further investigation was made. Probably because of oversight. The fact remains that no further inquiry was made along those lines by the Social Security Administration. All the evidence I pointed to is to the effect that he did suffer from this physical disability which prevented him from working.

Now, we urge that the other evidence is not sufficient to sustain the burden of proof which shifted to the Secretary to show that the claiment did not have a right to benefits. And it is not in the nature of substantial bemefits -- substantial evidence. For example, the reference to these lump-sum payments, and three other payments, as being deferred compensation, to mymind the idea of renewbering the essistance which Mr. Miller had given in the early days of this nev corporation, when it was struggling to survive, and doing so in terms of this gesture at the end of the year, perhaps supplemented by this auditor, or this accountant, and perhaps he was concerned with tax considerations even to the extent of fixing the amounts of the monthly payments. He has a perfect right to do that. Mr. Miller and Manhattan Direct Mail have a perfect right to do that. There's nothing improper about that. The fact of the matter is that the authorities hold that unless the payments are in the nature of earnings, unless they are made to componente the claimant for the work done during the period in question, them they are not a bar to Social Security benefits. Now, in that commection, I should like to cite three authorities and they've never been everyaled as far as I know. I will recite the citations and the holdings as I understand them. The first is Ford v. Ribbooff 199 Fed. Supp. 822, particularly at page 826, which concerned a retired director and vice-president of a company who was suffering from a physical Machility. In that case from impaired vision. And be visited the office of his company, just as Mr. Miller visited the office of his company, on occasion. He did so at his com pleasure and assisted, in

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that case, in minor matters. Mr. Miller did so whomever he felt like it. He didn't even assist in minor matters. And in the Ford v. Ribicoff case, the claimant engaged in these minor activities just to keep his mind occupied. Bear in mind, we're concerned with the situation where a man retires but is not required to be immobilized. the can engage in some activity. Now, in the Ford case, the claimant was paid \$100 per month salary, and \$150 per mouth retirement pay. It was held, at page 826 of the report, that even if the entire amount had been designated retirement pay, no question would have axison as to his retired status. In other mords, the inquiry by the Social Security Administration was aimed not at the designation given to the payment, but the purpose of the payments. And if it found that they were not paid for work performed during the time in question. the regardless of what other reason prompted their payment, there would be me bar to the benefits sought, Again, in Sewell v. Celebresse 216 Fed. Supp. 192, and more particularly at page 197, where a payment in the nature of a return eminvestment was made to the claimant, perhaps anthangeths aituation here, where the claiment had according to the testimeny of Mr. Evers, put in somewhere between 25 and \$0,000 in the early years of the company. In the Sewell case, there was a return on investment paid, and this in the Sewell case was not being compansation for service of a company president. The president being the claimant in that case. So as to preclude him from benefits. Again in Gardner v. Hall 366 Fed. 2nd-

JUDGE: Gardmer against who?

MR. MERKS: Hall. HALL. GARDNER v. Hall. It's an older case. 366 Fed. 2md 132. That case held that undistributed berporate profits should not be construed as wages for Social Security purposes. So that we have these authorities to the effect that even though our explanation, in terms . . . ecognition of the purpose of the payments made, that is, recognition of the earlier benefits conferred upon the company by the claimant, perhaps that is not dome among strangers. We feel that it is perfectly normal in a family-ma close family such as this one. That even if that is not accepted, that is not a substutite for the Social Security Administration demenstrating that the payments were actually made for work performed. Especially in the light of the prime facie case, to the effect that he couldn't perform that work, by reason of his physical disability. We have a situation, and I'm referring now to the criteria set forth in the Secial Security Handbook and other places in cases of this kind, where the management of the business was left in the hands of another member of the family, namely Mr. Buers, reflecting the fact that the departing parson, the claiment, had retired or was justified in retiring. He knew that the management had been taken over by a close member of the family. Again, we have testimony--repeated testimony to the effect that he devoted no substantial time to the business, when he might otherwise have occasion to render services. The testimony is, that at most, he showed up maybe four times a month and that's just a very very rough estimate. And even on those occasions, the testimony of Mr. Byers, 's to the effect that he came for perfunctory purposes. He

stayed maybe 15 minutes or as much as a hour. But even when he was there, he rendered no services. No significant services and no substantial services during the period of his retirement. During that time, that is, June '66 through 1971, there is no contradiction in any of the testimony that he spent considerably less than the 45 hours per month, which is one of the standards employed in the rules to determine whether or not one is deemed to be working in a particular establishment. The fact is, it was a very, very small fraction of 45 hours per month that he was present at all. Again, I believe at the outset of the testimony in the previous hearing it was to the effect that the budiness involved is a small business. It accupies one floor in a loft. It was so small that it did need these infusions of capital from time to time in the early days by Mr. Miller, and it comtinues to be a small business. As such, it required the active participation of any one who was employed in that business. And as I've findicated repeatedly, he could not -- the claimant could not actively participate in such a business because of his physical disability. Now, there is a reference in one of the exhibit; to the effect that he occasionally signed a check, on behalf of Mambattan Direct Mail. Of course, the signing of a check doesn't require an auditory capacity. The fact is, he was one of the necessary minimum of two officers of Mamhattan, and/or I believe the auditor as well, who had the right to sign checks. I submit that all that such a report might indicate would be that for the few moments, and with the insignificant effort required to sign a check when it happened to be convenient, during the time when

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he might have been present in Manhattan Direct Mail, he may have signed a check. But that is very, very far from preving that he performed any substantial work whatevever on behalf of Manhattan Direct Mail. Again, the listing of the alternate telephone numbers of Manhattan Direct Mail, in Staten Island, which corresponds with the telephone number at the home of the claimant asho corresponds with the telephone number of the claimant's wife, and the claimant's wife works in a managerial capacity on a daily basis in Manhattan Direct Mail, and her testimony is to the effect that that listing is to take advantage of the fact that there were occasions when it would be necessary to communicate with hex in connection with the tusiness by telephone. But that there would be no point in the claiment answering such a phone, and responding to it, because he couldn't bear. It's as simple as that. How, insofax as the alloged lack of cooperation with the Social Security Administration, in making its investigation is concerned, I don't want to speculate as to the legisimacy, or illegitimacy of that contestion. We submit that whether or not there were such cooperation, certainly this is a de novo hearing, certainly we have submitted in very full details all of the information which we relt, and which I believe, the tribunal has felt was pertinent to the issues involved. And as a de novo hearing, we believe we are en itled to have considered the evidence at the hearing, and not a reaction occasioned by a feeling of an investigator who rightly or wrongly may have felt rebuffed by personnel of the Hanhattan Direct Mail. The fact is, the testimony is that cooperation was extended more than fully, and that there was seme ground at least to believe that the investigation Li may not have been proper. Whether or not it was we urge that the Secretary of Health, Education, and Welfare is compermed with meeting his burden of proof, showing that the claiment has no right to benefits after the claimant has made out his prime facie case, and setting forth substantial evidence to that effect. And we urgs that there ism't a particle of such substantial evidence. Now, the claimant is A man who is not an idler, he hasn't spent his entire working life on the Welfare rolls, he hasn't been a time servex muiting for the day as is the current fashion when at some distant time he could retire after patting in a job, when he could wile away his time presending to be busy. He has gone off into the wildest parts of the world, he has expected himself to serious risks of injury and disease in ferreting out the doposits of oil for which he searched, and it is certainly as essential and important resource for the community. All that he asks from the tribunal is that he be g ven his due according to law. We submit that in-on the basis of the evidence that has come before year honor, the appropriate combination of this proceedings is a swift scision in his favor, and an equally swift rejection of the unfeestied objections which have previously been raised against him. Thank you.

JUDGE: Thank you, counselor. Decision received. I am going to
go over all the testimony that has been given by the claimant, and by
the three witnesses who have testified. I am going to review the entire
record that commists of the documents that have been marked into eivdence,

and then I will come to a decision. When I do, I will set my decision down in writing. Then I will forward to you, Mr. Miller, a copy of my decision and this will have all the reasons in support of it. And of course, courselor, won the day that that goes out, a copy of my decision with supporting reasons, will be forwarded to you, to your office. I would the add and say to you Mr. Miller, that you are quite fortunate in lawing an attorney who takes that kind of an interest in your case, I have been in this position, where I am now, for some 15 years, and The tried cases like this, in this position and at least 15 sta . an the United States covering the East, the South, and the Mid- 18 1 think perhaps I've said this, maybe once or twice, in the past 15 years. But one thing I pride myself on, is I pride myself on the recognition of talent, and I think you are very fortunate in having the attorney which you picked as your counselor to represent you today. Because his interrogation, in my opinion, was not only probative and exhaustive, but it was also very succinct and comprehensive. So I do think sir, that you are quite fortunate. This, of course, is no indication whatever, as to what my dictaion is going to be, because I don't even know what my decisions are going to be right now, myself . Be that as it may, since there appears to be nothing further to be added by way of testimony or documentary evidence at this time, this haring stands closed. Thank you very much for coming in.

MR. MARKS: Thank you, your honor.

(The hearing was closed at 1:00 P.M. August 8, 1973).

Today is August 8, 1973. This is the case of William D. Miller, Social Security 091-10-1320. I am reopening the record just to clarify one point. At the hearing held a few hours ago, certain papers were given exhibit numbers in error. This was purely by inadvertence. I am now changing the exhibit numbers, to this extent and to this extent only. The document marked exhibit 47 is now marked in as exhibit 66; the document marked exhibit 48 is now marked in as exhibit 67; the document marked exhibit 49 is now marked in as exhibit 68; the document marked exhibit 50 is now exhibit 69; the document 51 is now marked in with the correct number as exhibit 70; and the document previously marked as exhibit 52, should read and now reads exhibit 71. With this correction, all these exhibits now have the correct numbers. That is all.

## CERTIFICATION

I have read the foregoing and hereby certify that it is a true and complete transcription of the testimony recorded at the hearing held in the above case before Administrative Law Judge Lawrence Ashley.

Helen Long, Transcriber

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